FILE COPY

Office - Supreme Court, U.
FILED
APR 27 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 766

EDWARD K. BARSKY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

O. JOHN ROGGE,
WOLF, POPPER, ROSS & WOLF,
Attorneys for Petitioners.

MURRAY A. GORDON,
ROBERT H. GOLDMAN,
HERBERT J. FABRICANT,
LESTER LEVIN,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BEEKMAN 3—9084-5-6 182

INDEX

PAGE

Petition for Writ of Certiorari: 1

Statement on the Matter Involved 1

Jurisdiction 9

Statutes and Resolutions Involved 9

Questions Presented 11

Reasons Relied on for Allowance of the Writ 13

Conclusion 21

Brief in Support of Petition: 23

Opinions Below 23

Jurisdiction 23

Specifications of Errors 23

Summary of Argument 24

Argument: 26

I—The United States Court of Appeals for the District of Columbia has decided a question of general importance, relating to the construction of the Constitution and of the Resolution, which has not been, but should be, settled by this Court 26

II—The Resolution is Unconstitutional 29

A—The Resolution violates the First Amendment to the Constitution of the United States 29

B—The Resolution violates the Fifth and Sixth Amendments to the United States Constitution 36

PAGE

C—The Resolution violates the Ninth and Tenth Amendments to the United States Constitution 38

III—It was reversible error for the Trial Court to admit into evidence petitioners' testimony before the House Committee 41

Conclusion 44

TABLE OF CASES CITED

Alkon v. United States, 163 Fed. 810 (C. C. A. 1, 1908) 42, 43

Amey v. Long, 9 East 473 (K. B. 1808) 19

Barry v. United States ex rel. Cunningham, 279 U. S. 597 ..... 15, 39

Baumgartner v. United States, 322 U. S. 665 (1944) 32

Boehm v. Commissioner of Internal Revenue, 326 U. S. 287 (1945) 33

Bridges v. California, 314 U. S. 252 (1941) 17, 31, 32, 35

Bridges v. Wixon, 326 U. S. 135 (1945) 32

Brown v. United States, 276 U. S. 134 (1928) 20

Butts v. Merchants & Miners Transportation Co., 230 U. S. 126 37

Cafeteria Employees Union v. Angelos, 320 U. S. 293 (1943) 32

Cameron v. United States, 231 U. S. 710 (1914)..... 42

Cantwell v. Connecticut, 310 U. S. 106 (1940) 35

Carlson v. California, 310 U. S. 106 (1940) 16, 18, 35

Chambers v. Florida, 309 U. S. 227 (1940) 18

PAGE
Chapman, In re., 166 U. S. 661 (1897) 15, 39
Cline v. Frank Dairy Co., 274 U. S. 445 (1927) 17, 37
Cole v. Arkansas, 16 U. S. Law Week 4251 20
Colonial Sugar Refining Co. v. Attorney General, 15 Commonwealth L. R. 182 (1912) rev'd L. R. (1914) App. Cas. 237 30
Commonwealth v. International Harvester Co., 148 Ky. 37, 145 S. W. 1132 (1912) 19, 20
Commissioners v. Sellew, 99 U. S. 624 (1879) 20
Connally v. General Construction Co., 269 U. S. 385 (1926) 18
Counselman v. Hitchcock, 142 U. S. 547 (1892) 42
Cresson v. Louisville Courier-Journal, 299 Fed. 487 (C. C. A. 6, 1924) 27, 28
Cummings v. Missouri, 71 U. S. 277 (1867) 26, 30
DeJonge v. Oregon, 299 U. S. 353 (1937) 14, 16, 18, 20, 32, 34, 35, 38
Douglas v. Commissioner of Internal Revenue, 322 U. S. 275 (1944) 33
Ex Parte Endo, 323 U. S. 283 (1944) 17
Glickstein v. United States, 222 U. S. 139 (1911) 43
Greenfield v. Russel, 292 Ill. 392, 127 N. E. 102 (1920) .. 30
Grosjean v. American Press Company, 297 U. S. 233 (1936) 32
Hague v. C. I. O., 307 U. S. 496 (1939) 28
Haley, In re, 41 F. (2) 379 (S. D. Cal., 1930) 43
Hannegan v. Esquire, 327 U. S. 146 (1946) 17
Hartzel v. United States, 322 U. S. 680 (1944) 19
Hearst v. Black, 87 F. (2) 68 (App. D. C. 1936) 27
Helvering v. Reynolds Tobacco Co., 306 U. S. 110 (1939) 33

PAGE

Herndon v. Lowry, 301 U. S. 242 (1937) 16, 32, 38

Ironclad Mfg. Co., In re, 201 Fed. 66 (C. C. A. 2, 1912) 19

Jacobs v. United States, 161 Fed. 694 (C. C. A. 1, 1908) 41, 42, 43

Jamison v. Texas, 318 U. S. 413 (1943) 35

Jones v. Opelika, 316 U. S. 584 (1942) 13, 28, 30

Jones v. Securities & Exchange Commission, 298 U. S. 1 (1936) 28, 38

Josephson v. United States, 165 F. (2) 82 (C. C. A. 2, 1947) cert. den. 333 U. S. 27n, 28n, 32n, 37n, 41n

Jurney v. MacCracken, 294 U. S. 125 (1935) 15

Keegan v. United States, 325 U. S. 478 (1945) 19

Kilbourn v. Thompson, 103 U. S. 168 (1881) 15, 25, 29, 38, 39, 40

Kraus & Bros. v. United States, 327 U. S. 614 (1946) .. 16, 17, 37

Lanzetta v. New Jersey, 306 U. S. 451 (1939) 17, 37

Largent v. Texas, 318 U. S. 418 (1943) 17

Lovell v. Griffin, 303 U. S. 444 (1938) 13, 16, 17, 18, 28, 32, 35

Marshall v. Gordon, 243 U. S. 52 (1917) 15, 38

Martin v. Struthers, 319 U. S. 141 (1943) 35

McGrain v. Daugherty, 273 U. S. 135 (1927) 15, 28, 29, 38, 39

Mellon v. Brewer, 18 F. (2) 168 (App. D. C. 1927) cert. den. 275 U. S. 530 (1927) 27

Merchants National Bank v. Commissioner of Internal Revenue, 320 U. S. 256 (1943) 33

Munroe v. United States, 216 Fed. 107 (C. C. A. 1, 1914) 19

PAGE

Murdock v. Pennsylvania, 319 U. S. 105 (1943) 32

Musser v. State of Utah, 333 U. S. 95 (1948) 17

Musser v. Utah, 333 U. S. 95 (1948) 35

National Lead Co. v. United States, 252 U. S. 140 (1920) 33

Near v. Minnesota, 283 U. S. 697 (1931) 14, 34

Pacific Railway Commission, In re, 32 Fed. 241, 250 (N. D. Cal. 1887) 38

Poe v. Seaborn, 282 U. S. 101 (1930) 33

Reed v. County Commissioner of Delaware County, 277 U. S. 376 (1928) 15, 39

Russell v. McLellan, 21 Fed. Cas. 12, 158 (D. Me. 1847) 19

Schenck v. United States, 249 U. S. 47 (1919) 31

Schneider v. Irvington, 308 U. S. 147 (1939) 17, 18, 35

Schneiderman v. United States, 320 U. S. 118 (1943) ... 17, 32, 37

Screws v. United States, 325 U. S. 91 (1945) 19, 32

Sinclair v. United States, 279 U. S. 263 (1929) 15, 28, 29, 38, 39

Smith v. Cahoon, 283 U. S. 553 (1931) 13, 28

Spalding v. Vilas, 161 U. S. 483 (1896) 27

Stromberg v. California, 283 U. S. 359 (1931) 14, 16, 32, 34, 35, 38

Sykes, In re, 23 Fed. Cas. 13, 707 (S. D. N. Y. 1878) ... 19

Taylor v. Mississippi, 319 U. S. 583 (1943) 32

Thomas v. Collins, 323 U. S. 516 (1945) 16, 17, 31 32, 33, 34, 35

Thornhill v. Alabama, 310 U. S. 88 (1940) 16, 18, 28, 32, 35

PAGE

United States v. American Tobacco Co., 146 Fed. 557 (S. D. N. Y. 1906) 19

United States v. Ballard, 322 U. S. 78 (1944) 17, 30

United States v. Carolene Products Co., 304 U. S. 144 (1938) 18, 36

United States v. Cerecedo Hermanos y Co., 209 U. S. 337 (1908) 33

United States v. Cohen Grocery Co., 255 U. S. 81 (1921) 17, 37

United States v. De Lorenzo, 151 F. (2) 122 (C. C. A. 2, 1945) 42

United States v. Hewitt, 328 U. S. 189 (1946) 20

United States v. Monia, 317 U. S. 424 (1943) 41

United States v. Murdock, 290 U. S. 389 (1933) 19

United States v. Reese, 92 U. S. 214 (1875) 17, 37

United States v. Sullivan, 332 U. S. 689 (1948) 37

Wakefield v. Housel, 288 Fed. 712 (C. C. A. 8, 1923) 43

West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943) 14, 17, 18, 31, 32, 33, 34, 36

Wilson v. United States, 221 U. S. 361 (1911) 20

Winters v. New York, 16 U. S. Law Week 4279 ... 16, 17, 18, 35, 36n, 38

Yenkichi Ito v. United States, 64 F. (2) 73 (C. C. A. 9, 1933) cert. den. 289 U. S. 762 (1933) 20

Yo Cong Eng v. Trinidad, 271 U. S. 500 (1926) 37

Other Authorities Cited

PAGE

Abramowitz, The Great Prisoners, 316 (1946) 30
47 Columbia Law Review, 416 (Note) (1947) ..13, 14, 15, 34n
47 Columbia Law Rev. 416 (1947).....30, 35, 38, 40n
Cushman, "Safeguarding Our Civil Liberties," 7-8 (1943) 30
26 Cong. Globe, 34th Cong., 3rd Sess. 439 et seq. 38
81 Cong. Rec. 3285 (1937) 36
83 Cong. Rec. 7567-7686 (1938) 33
84 Cong. Rec. 1098-1128 (1939) 33
86 Cong. Rec. 572-605 (1940) 33
87 Cong. Rec. 886-900 (1941) 33
88 Cong. Rec. 2282-2297 (1942) 33
89 Cong. Rec. 721-729 (1943) 33, 36
91 Cong. Rec. 10-14 (1945) 33
92 Cong. Rec. 7720-7728 (1946) 33, 36n
94 Cong. Rec. 2395 (1948)..... 15
94 Cong. Rec. 2483-2496 (1946) 33
94 Cong. Rec. 2413 (1948) 34n
94 Cong. Rec. 2487.....30, 34n
Eberling, "Congressional Investigations" 383 (1928) .. 40
Ehrmann, "The Duty of Disclosure in Parliamentary Investigation" 30
Federal Rules of Civil Procedure (18 U. S. C. Foll. § 687), Rule 37(b) 9
Gellerman, Martin Dies, c. 7 (1944).....14, 30
Gose "The Limits of Congressional Investigating Power"..... 38
60 Harvard Law Rev. 1193 (1947) 31
H. R. 4564, 80th Cong. 1st Sess. (1947) 34n
H. Report 2233, 78th Cong. 2d Sess. 9-13 (1946)..... 13
H. Report 2, 76th Cong., 1st Sess. 13 (1939)..... 15

PAGE

H. Report 2742, 79th Cong., 2nd Sess. 16 (1947)..... 15
H. Report 2277, 77th Cong. 2nd Sess. Minority Report (1942)..... 31
H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10 (January 3, 1945)..... 9
Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. § 347), Section 240(a)..... 9
Kahn, Hollywood on Trial (1948)..... 14
N. Y. Herald Tribune, March 14, 1948, p. 22, cols. 6-8 .. 30
New York Herald Tribune, April 19, 1948, p. 12, col. 3 .. 34n
N. Y. Times, Oct. 8, 1947, p. 7, col. 5..... 30
3 New York City Bar Ass'n. 93 (1948)..... 34n
Ogden, The Dies Committee, c. IV, et seq..... 30
R. S. § 103, as amended June 27, 1938, c. 594, 52 Stat. 942..... 9
R. S. § 859, as amended June 22, 1938, c. 594, 52 Stat. 943..... 10
2 U. S. C. § 192.....9, 18, 28, 37
11 U. of Chic. Law Rev. 1 (1944)..... 30
14 U. of Chic. Law Rev. 256 (Note) (1947)...15, 28, 30, 36, 40
15 U. of Chic. Law Rev. 442 (Note) (1948)..... 43
96 U. of Penn. Law Rev. 381 (Note) (1948).....15, 30, 40n
18 U. S. C. § 88..... 1
18 U. S. C. §§ 1-17, et seq..... 15
18 U. S. C. §§ 1-17, et seq. 34
28 U. S. C. § 634.....10, 12, 24, 25, 41, 42, 43
50 U. S. C. § 31.....15, 34
10 Washington Law Review 61, (1935)..... 38
8 Wigmore, Evidence § 2195, p. 80 (3 ed. 1940)..... 38, 42
Wyzanski "Standards for Congressional Investigation"..... 34n

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No.

EDWARD K. BARSKY, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered March 18, 1948 (R. 656), affirming judgments of conviction of each of the petitioners in the United States District Court for the District of Columbia (R. 31-37).

Statement of the Matter Involved

The indictments herein (R. 2-6) charged each of 17 individual defendants with having committed two offenses: the felony of conspiring to commit offenses against and to defraud the government (18 U. S. C. § 88); the misdemeanor of personally committing a contempt of a Con-

gressional committee (2 U. S. C. § 192). The conspiracy count was dismissed by the trial Court at the conclusion of the trial (R. 589) and is not before this Court.

Both charges derived from an investigation of the Joint Anti-Fascist Refugee Committee (sometimes hereinafter referred to as "JAFRC") by the House Committee on Un-American Activities (sometimes hereinafter referred to as the "House Committee"). The investigation of the JAFRC by the House Committee was conducted pursuant to House Resolution 5, 79th Cong., 1st Sess. (1945) (hereinafter sometimes referred to as "the Resolution") wherein the House Committee was authorized to investigate "un-American propaganda activities" and "subversive and un-American propaganda" which "attacks the principle of the form of government as guaranteed by our Constitution" (Gov. Ex. 30, R. 205-207).[1] The Resolution also accorded the House Committee the power to summon witnesses and records.

The JAFRC, an unincorporated association, is a relief organization (R. 540-543) which was licensed by the President's War Relief Board (R. 303, 328). The petitioners herein are members of the Executive Board of the JAFRC. The Board was originally comprised of 18 members (Gov. Ex. 36-C, R. 544-545), with Dr. Barsky as Chairman of the JAFRC Executive Board (R. 422) and Helen R. Bryan as Executive Secretary (R. 106).

On December 1, 1945, Ernie Adamson, Chief Counsel of the House Committee, wrote to the JAFRC in a letter

---

[1] House Resolution 5 amended the Rules of the House of Representatives to constitute the House Committee a standing committee. 91 Cong. Rec. 10, 15 (1945). The House Committee was originally established in 1938 as a temporary committee. H. Res. 282, 75th Cong., 3d Sess. (1938). It presently operates, as the first permanent standing investigating committee in American history, under the Legislative Reorganization Act of 1946. Pub. L. 601, 79th Cong., 2d Sess., § 121(b)(1)(q) (1946). The scope of the investigatory power of the House Committee has been the same from its inception to date. H. Res. 26, 76th Cong., 1st Sess. (1939); H. Res. 321, 76th Cong., 3d Sess. (1940); H. Res. 90, 77th Cong., 1st Sess. (1941); H. Res. 420, 77th Cong., 2d Sess. (1942); H. Res. 65, 78th Cong., 1st Sess. (1943).

addressed to Dr. Barsky requesting that a "convenient date" be fixed "when our investigators can call at your office and make a preliminary investigation of your records" (Gov. Ex. 27, R. 214). At the time this letter was sent, the House Committee had no sworn testimony in its files concerning the JAFRC (R. 326), but apparently acted on the basis of the following: (1) a letter dated January 14, 1944 from William Loeb, a newspaper publisher, to the President's War Relief Control Board urging that the JAFRC not be granted membership in the National War Fund because he had the "sincere belief" that the JAFRC "is not an American group" (Gov. Ex. 1 at p. 607-a, R. 318-319) and, according to Congressman Wood, an oral request by War Relief Control Board officials to investigate the JAFRC (R. 326-327)[2]; (2) unidentified letters and post cards "complaining of this organization" (R. 326, 332-333, 349); and (3) information allegedly obtained from the State Department that the JAFRC had applied for transit visas through the United States to Mexico for "outstanding Communists"[3] (R. 338-341) and the "assumption" that those refugees would stay in the United States if granted such visas (R. 353-354). Dr. Barsky responded on December 5, 1945 that the letter of Mr. Adamson would be submitted to an emergency meeting of the Executive Board "and I will advise you promptly of its decision" (Gov. Ex. 28, R. 215).

---

[2] The War Relief Control Board continued to license the JAFRC until the Board ceased to exist although the House Committee requested the revocation of that license (R. 328-329).

[3] Government witness Robert C. Alexander, Assistant Chief, Visa Division, State Department, was unable to recall any specific cases where the JAFRC had applied for a transit visa for a refugee (R. 266, 291). He testified that one member of the Executive Board, aided by a letter from Helen Bryan, applied for a visa for his brother Bela Lustig and that application was not approved (R. 266, 286). Ruth Leider, a member of the Executive Board, represented several visa applicants as an attorney and although Mr. Alexander originally testified that no favorable action was taken in any of those cases, he could not cite any instances where an applicant represented by Ruth Leider was denied a visa and "revised" his testimony when confronted with 14 cases in which applicants she had represented were approved by the State Department (R. 554).

On December 4, 1945, before the reply of Dr. Barsky was received by the House Committee, the House Committee issued a document which by its terms commanded the Sergeant at Arms to summon Helen Bryan or Dr. Barsky to testify before it on December 19th and to produce at that time "all books, records, papers and documents" concerning JAFRC receipts and disbursements "and all letters, memoranda or communications from, or with, any person or persons outside of the United States" (Gov. Ex. 25, R. 221-222). Helen Bryan was served with the aforesaid summons by a clerk of the House Committee on December 14 (R. 217, 222). On that same day the JAFRC Executive Board met and instructed Helen Bryan and Dr. Barsky, by resolution, to advise with counsel and to "take any additional steps necessary and pursue all means to maintain and protect the rights" of the JAFRC "from the unjustified attack" on the JAFRC by the House Committee "which we consider constitutes a threat to democratic procedure in the United States" (Gov. Ex. 36-A, R. 540-542).

Helen Bryan appeared before the House Committee on January 24, 1946 (R. 223, 227) and did not produce the summoned records (R. 106-108). She was not permitted to make or leave with the House Committee a statement of the reasons for the non-production of those books and records or a prepared detailed statement of the JAFRC activities (R. 108-110).

The following day a subpoena to Dr. Barsky was issued by Congressman Wood, as Chairman of the House Committee, to appear on January 30, 1946 to testify and to bring with him all records indicating all contributors to and disbursements by the JAFRC in 1944 and 1945, and all correspondence received and sent by the JAFRC from and to outside the United States (Gov. Ex. 23, R. 223-225). This subpoena was served on January 28, 1946 (R. 225) and Dr. Barsky appeared on the adjourned date of Febru-

ary 13, 1946 (Gov. Ex. 2, R. 421-434). Two days prior to his appearance, five members of the Executive Board met[4] and a resolution was adopted[5] re-iterating that the JAFRC cannot "be considered Un-American, subversive, or an attack upon the principles of our form of government" and instructing Dr. Barsky not to produce the summoned books and records (Gov. Ex. 36-B, R. 542-544). At the hearing before the House Committee Dr. Barsky was questioned and testified. He stated that he could not produce the summoned books and records since he did not have custody or possession thereof (R. 427-430), and he further indicated that the JAFRC could not be considered "a fit committee for investigation by any committee to investigate un-American activities" (R. 431).

Although neither Helen Bryan nor Dr. Barsky was questioned by the House Committee as to the activities of the JAFRC or permitted to make any statement describing those activities, several other witnesses were.

Miss Martha E. Mitchell appeared in executive session before the House Committee on January 23, 1946 and testified as to her experiences in Spain in 1937 with the American Unit Hospital established there on behalf of the Loyalists and under the supervision of Dr. Barsky (Gov. Ex. 1, R. 41-99). In connection with her testimony, a series of newspaper articles by Frederick Woltman, which appeared in 1941 based upon information from Miss Mitchell, was received by the House Committee (R. 65-85). Since the JAFRC was not formed until March, 1942 (R. 423), Miss Mitchell could provide no information as to the JAFRC but did testify as to Dr. Barsky.[6]

---

[4] Dr. Barsky, Dr. Jacob Auslander, Mrs. Ruth Leider, Manuel Magana, and Prof. Lyman R. Bradley.

[5] The minutes of the meeting indicate that 7 other members of the Board voted in absentia: Howard Fast, Mrs. Marjorie Chodorov, Leverett Gleason, Harry M. Justiz, Mrs. Samuel Kamsly, Mrs. Charlotte Stern and Dr. Jesse Tolmach.

[6] Miss Mitchell was not produced for cross examination. Her testimony before the House Committee was admitted at the trial over objections (R. 296, 298).

On February 15, 1946 the House Committee heard Mr. Alexander of the Visa Division of the State Department (Gov. Ex. 3, R. 245-258). Mr. Alexander acknowledged his unfamiliarity with the JAFRC relief activities (R. 256) and could testify specifically to only one fact, *i. e.*, a visa was denied to the brother of James Lustig (R. 248-250).[7]

The House Committee also received, sometime after January 23, 1946, a letter from J. Edgar Hoover, Director of the Federal Bureau of Investigation. The letter recited that in September, 1945, the JAFRC had used sound trucks in New York City to raise funds, urging the severance of diplomatic relations with Spain and referring to "labor controversies then current in the New York City area" (Gov. Ex. 4, p. 854, R. 306-307).

Upon the foregoing information,[8] and subsequent to the appearances of Helen Bryan and Dr. Barsky, the House Committee on March 29, 1946 issued 16 individual mandates addressed to the Sergeant At Arms, or his Special Messenger, to summon 16 named persons to appear and testify before the House Committee on April 4, 1946 (Gov. Exs. 7 through 22). The parties to be summoned were all the members of the JAFRC Executive Board except Dr. Barsky and John T. McManus.[9] Each mandate further instructed the Sergeant At Arms to bring with him all books and records of the JAFRC from January 1, 1945 to April 4, 1946 concerning JAFRC receipts and disbursements, and JAFRC correspondence with persons in foreign countries during that same period (R. 228-229). Service was made on the members of the Board named in the mandates: eight of the petitioners were served on March 29,

---

[7] Mr. Alexander also gave the House Committee his opinion, based mainly on hearsay, as to the political orientation of the JAFRC and several of its members. This testimony was seriously undermined upon the cross examination of Mr. Alexander at the trial (R. 547-554; see also R. 260-282, 290-294).

[8] Congressman Wood also testified that he had seen a book written by one of the JAFRC Executive Board about Tito "in which he made the statement in the book that this organization financed the return of Mr. Tito" (R. 327).

[9] John T. McManus was never otherwise summoned by the House Committee.

1946 (R. 134, 136, 137, 142, 146, 153, 156-157, 161-162); one was served on April 1 (R. 151); and another was served on April 3 (R. 167). One mandate named the JAFRC and was served on Helen Bryan on March 29 (R. 181).

All the petitioners, except Dr. Barsky, and five other members of the Executive Board appeared on April 4. Each of them took the oath administered by the chairman and testified (Gov. Ex. 6, R. 400) but did not produce the books and records (R. 230). The witnesses uniformly indicated that Helen Bryan had custody and control of the documents sought and was responsible for the production or non-production thereof. Helen Bryan also appeared that day (R. 230) and refused to produce the books and records (Gov. Ex. 6, p. 103). In a written statement which she sent to the Committee she informed the Committee that she considered that it had no constitutional right to the books and records and that the production thereof would publicize recipients of JAFRC funds and "put in jeopardy the lives of those members of their families who are at the mercy of the Franco dictatorship" (Gov. Ex. 6, pp. 103-105).

On March 31 of the next year, 1947, all the members of the JAFRC Executive Board except John T. McManus were indicted by the Grand Jury on two counts as aforesaid: for an alleged conspiracy; and for an alleged contempt, after having been cited by the House of Representatives for their alleged willful and deliberate refusal to produce the aforementioned books and records.

Thereafter each of the indicted parties pleaded not guilty to both counts of the indictment (R. 6-10).

A motion to dismiss the indictment on constitutional and other grounds (R. 17) was denied on May 21, 1947 by Judge HOLTZOFF with an opinion (R. 614-624).

The trial, with Judge RICHMOND B. KEECH presiding, began on June 13, 1947[10] (R. 115). The jury heard the evidence, except that the testimony submitted to prove that the books and records sought were pertinent to a "matter under inquiry before" the House Committee (2 U. S. C. § 192) was heard by Judge KEECH out of the presence of the jury (R. 231). The trial Judge held and charged the jury that the books and records sought were pertinent to the matter under inquiry[11] and that the House Committee had a reasonable basis to investigate the JAFRC (R. 607).

On June 26, 1947, at the close of the entire case, Judge KEECH directed a verdict of not guilty as to all sixteen defendants on the first count of the indictment, the conspiracy count, for lack of evidence (R. 589).

On June 27, 1947, the jury gave as ordered a verdict of not guilty as to all defendants on the first count (R. 604, 31); but the jury found all the defendants guilty on the second count (R. 31). The defendants promptly made a motion for a new trial or for judgment of acquittal (R. 37) which was denied on July 11, 1947 (R. 40).

Fifteen of the defendants were each sentenced to three months' imprisonment and fined $500.00 (R. 32-37); Dr. Barsky was sentenced to six months' imprisonment and fined $500.00 (R. 31). The trial Court suspended the sentences of five of the aforesaid defendants; those five paid their respective fines and are not before this Court. The other eleven, petitioners herein, were released on bail of $500.00 each pending appeal (R. 31-37).

The cause was argued before the United States Court of Appeals for the District of Columbia on November 24, 1947. On March 18, 1948, the convictions were affirmed by a divided court (R. 656). A petition for rehearing was there-

[10] Upon the trial sixteen members of the Executive Board were defendants; one member was abroad at that time.

[11] The books and records themselves were never examined by the trial Court although petitioners offered those books and records for inspection (R. 233).

after filed by petitioners and denied on March 29, 1948 (R. 657). The mandate was stayed by order of the Court of Appeals until April 29, 1948 pending filing of this petition.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. § 347); Federal Rules of Criminal Procedure, Rule 37(b) (18 U. S. C. foll. § 687).

Statutes and Resolutions Involved

1. 2 U. S. C. § 192; R. S. § 103, as amended June 27, 1938, c. 594, 52 Stat. 942.

> *Refusal of witness to testify.* Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refused to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2. H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15 (January 3, 1945).

> Resolved, That the rules of the Seventy-eighth Congress be, and they are hereby, adopted as the rules of the Seventy-ninth Congress.
>
> That rule X of the Rules of the House of Representatives is amended by adding after clause 40a of the first paragraph a new clause to read as follows:

'40b. On Un-American Activities, to consist of nine members.'

Rule XI of the Rules of the House of Representatives is amended by adding after clause 40a two new clauses to read as follows:

'40b. To Un-American Activities—to the Committee on Un-American Activities.

'40c. The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

'The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

'For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the Committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.'

3. 28 U. S. C. § 634; R. S. § 859, as amended June 22, 1938, c. 594, 52 Stat. 943.

No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

Questions Presented

1. Whether the Resolution as construed and applied herein abridged the freedom of speech, press and assembly of petitioners in violation of the First Amendment to the Constitution of the United States (R. 17, 611).

2. Whether the Resolution, on its face, authorized the House Committee to abridge the freedom of speech, press and assembly of petitioners thereby violating the First Amendment to the Constitution of the United States (R. 17, 611).

3. Whether the Resolution, on its face and as construed and applied by the House Committee, acts as a prior restraint upon speech, press and assembly in violation of the First Amendment to the Constitution of the United States (R. 17, 611).

4. Whether the Resolution, on its face and as construed and applied by the House Committee, invests the House Committee with powers not delegated to the Congress by the Constitution of the United States in violation of the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States (R. 17, 611).

5. Whether the Resolution failed to provide petitioners with an ascertainable standard of guilt, whereby petitioners

could determine, in advance, whether they were committing contempt by the non-production of the books and records summoned in violation of the Fifth and Sixth Amendments to the Constitution of the United States (R. 17, 611).

6. Whether the petitioners made a wilful default in production of books and records within the meaning of Title 2, Section 192 of the United States Code (R. 562, 611).

7. Whether it was error to admit in evidence the testimony of the petitioners before the House Committee in violation of Title 28, Section 634 of the United States Code (R. 38, 560).

8. Whether the trial Court erred in finding and charging[12] the jury that the records summoned were pertinent to the matter under inquiry and erred in excluding[13] certain evidence submitted by petitioners as to the lack of pertinency of those records (R. 38, 611).

9. Whether the trial Court erred in charging[14] the jury that compliance with the alleged subpoenas duces tecum was obligatory for each petitioner who "alone or in concert . . . had custody or control over such records" and in refusing petitioners' charge[15] (R. 18, 38, 561, 611).

10. Whether the trial Court erred in submitting the issue of aiding and abetting to the jury and in the charge[16] given with respect to that issue (R. 39, 626).

---

[12] The charge appears at R. 607.

[13] The evidence was excluded at R. 233, 356, 364-365, 367-369.

[14] The charge appears at R. 610.

[15] The charge requested by petitioners appears at R. 598.

[16] The charge appears at R. 610.

Reasons Relied on for Allowance of the Writ

1. The United States Court of Appeals for the District of Columbia, by a divided Court, has decided a question of foremost importance, relating to the construction of the Resolution creating the House Committee and of the First, Fifth, Sixth, Ninth and Tenth Amendments to the United States Constitution as they pertain to that Resolution and the House Committee, which question has not been, but should be settled by this Court. This is an appropriate case for this Court to decide the constitutional questions raised by the Resolution and urged upon this Court's consideration by the dissent of EDGERTON, *J.* (R. 651). The charged default occurred at a point beyond which petitioners could not comply without forfeiting constitutional rights. *Smith* v. *Cahoon,* 283 U. S. 553 (1931); *Lovell* v. *Griffin,* 303 U. S. 444 (1938); see *Jones* v. *Opelika,* 316 U. S. 584, 600, 602 (1942).

2. The United States Court of Appeals for the District of Columbia held that petitioners' rights under the First Amendment could be impaired by the House Committee investigation authorized by the Resolution, although no clear and present danger to justify such abridgement was shown or exists, on the ground that "some reasonable cause for concern" appears (R. 636). This decision is in conflict with the applicable decisions of this Court. The investigation authorized by the Resolution abridges the speech and expression which is the subject matter of that investigation. The Resolution on its face, and by incorporation of the House Committee construction and practices by the annual re-enactment of the Resolution since 1938, invests the House Committee with unlimited power to investigate the opinions and expressions of individuals and organizations (Note, 47 *Columbia Law Rev.* 416, 418 (1947)); to investigate the principal media of communication including radio (see, *e. g.,* H. Report 2233, 79th Cong. 2d Sess. 9-13 (1946)),

the universities (*Gellerman, Martin Dies*, c. 7 (1944)), and the motion pictures (*Kahn, Hollywood on Trial* (1948)); to act as a "'grand jury' . . . in session to investigate un-American activities at all times" (91 Cong. Rec. 275 (1945)); and to try in the public press and to punish by notoriety and by economic and political sanctions those the House Committee considers "subversive" or "un-American" (Note, 47 *Columbia Law Rev.* 416, 418-419, 427-428 (1947)). The abridgement of speech, press and assembly by the House Committee is no incident or by-product of an investigation into a matter proper for Congressional inquiry; it is the actual and intended effect of the investigation authorized by the Resolution. The proper constitutional standard for the Resolution is the clear and present danger test.

3. The United States Court of Appeals for the District of Columbia held that "there was justification here . . . for the exercise of the power of inquiry" sufficient to warrant the abridgement of petitioners' rights under the First, Fifth, Ninth and Tenth Amendments to the United States Constitution (R. 637). This decision is in conflict with the applicable decisions of this Court.

a. There is no constitutionally sufficient justification for the inquiry since it abridges speech, press and assembly which create no clear and present danger. The applicable decisions of this Court establish that the security and safety of the state are threatened rather than safeguarded by abridgements of speech, press and assembly which do not create a clear and present danger. *Stromberg* v. *California*, 283 U. S. 359, 369 (1931); *Near* v. *Minnesota*, 283 U. S. 697, 721 (1931); *DeJonge* v. *Oregon*, 299 U. S. 353, 365 (1937); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636 (1943).

b. The investigatory power of Congress does not provide a constitutionally sufficient justification for the in-

quiry authorized and conducted under the Resolution. The investigatory power is an auxiliary power incidental to the Congressional power. *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613 (1929); *McGrain* v. *Daugherty*, 273 U. S. 135, 173 (1927); *Jurney* v. *MacCracken*, 294 U. S. 125, 147 (1935); *Marshall* v. *Gordon*, 243 U. S. 521, 541 (1917); *Sinclair* v. *United States*, 279 U. S. 263, 291 (1929); *In re Chapman*, 166 U. S. 661, 667 (1897); *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376, 388 (1928). An investigation into the private affairs of private citizens is void for want of jurisdiction under the Ninth and Tenth Amendments to the Constitution of the United States if it is not plausibly related to prospective valid legislation. *Kilbourn* v. *Thompson*, 103 U. S. 168, 193, 196 (1881); cf. *Marshall* v. *Gordon*, 243 U. S. 551 (1917). The gap between the federal statutes applicable to the area into which the House Committee is purportedly inquiring (18 U. S. C. §§ 1-17, 21-39, 51-61, 71-151; 50 U. S. C. § 31) and the constitutional limits to legislation in that area is too narrow to justify the extensive inquiry into opinion and expression authorized by the Resolution. A decade of investigation by the House Committee has not yielded any valid legislation resulting from recommendations by the House Committee. 94 Cong. Rec. 2495 (1948); Notes, 96 *U. of Penn. Law Rev.* 381, 396 (1948); 14 *U. of Chic. Law Rev.* 256, 259 (1947); 47 *Columbia Law Rev.* 416, 427 (1947). The House Committee itself considers its function to be "exposure" rather than the production of valid legislation. H. Report 2, 76th Cong., 1st Sess. 13 (1939); H. Report 1, 77th Cong., 1st Sess. 24 (1941); H. Report 2742, 79th Cong., 2nd Sess. 16 (1947).

4. The United States Court of Appeals for the District of Columbia held that "the power of inquiry was validly delegated by the Congress to the Committee" because irrespective of the vagueness of the clause of the Resolution authorizing the House Committee to investigate "un-

American propaganda activities," the clause authorizing the House Committee to investigate " 'subversive and un-American propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution' . . . is definite enough" (R. 637-638). This decision is in conflict with the applicable decisions of this Court. Irrespective of whether the Resolution is definite enough as a delegation of power, the power delegated is so vague and indefinite as to permit the impairment "of incidents fairly within the protection of the guarantee of free speech" and "is void, on its face, as contrary to the [First] Amendment". *Winters* v. *New York*, 16 U. S. Law Week 4279 (decided March 29, 1948). A statute so vague and indefinite that it extends to speech which may not be impaired as well as speech which may be abridged is a prior restraint on all speech in violation of the First Amendment. *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940); *Carlson* v. *California*, 310 U. S. 106, 111 (1940); *Thomas* v. *Collins*, 323 U. S. 516, 534, 541 (1945); *Winters* v. *New York*, 16 U. S. Law Week 4279 (1948); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931).

5. The United States Court of Appeals for the District of Columbia held the Resolution constitutional although not on its face directly and exclusively concerned with such activities as may be constitutionally restricted on the grounds that the Resolution is not a penal statute (R. 638). This decision is in conflict with the applicable decisions of this Court. The Resolution is enforceable, and is here being enforced, by penal sanctions and is to be treated as any other penal statute. *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946). The requirement that legislative acts abridging speech must be limited to speech which may constitutionally be impaired applies not only to statutes which define crimes but also to legislative acts which confer

upon an agency of government the power to abridge expression. *Hannegan* v. *Esquire*, 327 U. S. 146 (1946); *Ex parte Endo*, 323 U. S. 283, 298-300 (1944); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Schneider* v. *Irvington*, 308 U. S. 147 (1939); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *United States* v. *Ballard*, 322 U. S. 78 (1944); *Bridges* v. *California*, 314 U. S. 252 (1941).

6. The United States Court of Appeals for the District of Columbia held that the Resolution provided petitioners with an adequate standard of guilt in that "the question addressed to these appellants was pertinent to the subject . . . of the resolution" (R. 638). This decision is in conflict with the applicable decisions of this Court. The terms used in the Resolution and relied upon by the United States Court of Appeals for the District of Columbia have no fixed or definite meaning. *Schneiderman* v. *United States*, 320 U. S. 118 (1943); *Winters* v. *New York*, 16 U. S. Law Week 4279, 4282 (1948); cf. *Musser* v. *State of Utah*, 333 U. S. 95 (1948). The Resolution violates the Fifth and Sixth Amendments in that it exposed petitioners to criminal sanctions without providing petitioners, in advance, with fixed and definite standards whereby petitioners could ascertain what acts would constitute the crime of contempt. *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *United States* v. *Reese*, 92 U. S. 214 (1875). The subsequently determined pertinency of the demand made upon petitioners does not supply the Resolution with an adequate standard of guilt. Irrespective of whether the crime charged is judicially determined to be clearly within the statute defining the crime, the statute "violates an accused's rights under procedural due process" if the statute fails "to give fair notice of

what acts will be punished" (*Winters* v. *New York*, 16 U. S. Law Week 4279 (1948)) to "men of common intelligence" (*Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926)).

7. The United States Court of Appeals for the District of Columbia held that the remedy for the abuses committed by the House Committee under the Resolution upon constitutionally guaranteed rights and liberties of persons and organizations investigated by the House Committee "is for Congress, or for the people; it is political not judicial" (R. 640-641). This decision is in conflict with the applicable decisions of this Court. The failure to draft a narrowly drawn Resolution which would interdict such abuses in the administration of the Resolution constitutes the Resolution a violation of the First Amendment. *Thornhill* v. *Alabama*, 310 U. S. 88, 97, 105 (1940); *DeJonge* v. *Oregon*, 299 U. S. 353, 364 (1937); *Carlson* v. *California*, 310 U. S. 106, 112 (1940); *Lovell* v. *Griffin*, 303 U. S. 444, 450 (1938); *Schneider* v. *Irvington*, 308 U. S. 147, 162 (1939). Relief from invasions of constitutionally guaranteed civil rights is not confined to the Congress. Minority groups affected by the House Committee, unable as minorities to obtain relief from the Congress, can invoke this Court's power to review Congressional action which impairs their civil liberties. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943); cf. *Chambers* v. *Florida*, 309 U. S. 227, 238 (1940). Judicial relief from Congressional action which abridges speech, press and assembly is necessary to make available the channels whereby legislative relief may ultimately be obtained. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938).

8. The United States Court of Appeals for the District of Columbia held that petitioners committed a "wilfull" default within the meaning of Title 2, Section 192 of the United States Code although no specific criminal intent

was shown (R. 642). This decision is in conflict with the applicable decisions of this Court. The term "wilfull," in the context of the vague language of the Resolution, requires a specific criminal intent. *Screws* v. *United States,* 325 U. S. 91 (1945); *Hartzel* v. *United States,* 322 U. S. 680 (1944). Petitioners, having acted in bona fide reliance upon advice of counsel and upon the honest and reasonable belief that the Resolution was unconstitutional, have not committed a "wilfull" default. *Keegan* v. *United States,* 325 U. S. 478 (1945); *United States* v. *Murdock,* 290 U. S. 389 (1933).

9. The United States Court of Appeals for the District of Columbia has erroneously decided a question of substance relating to the construction of Section 634, Title 2 of the United States Code which has not been, but should be, settled by this Court (R. 643).

10. The United States Court of Appeals for the District of Columbia has erroneously decided a question of general importance relating to the obligation of members of an unincorporated relief association to produce, in response to subpoenas *duces tecum* addressed to the members individually, organization books and records not in their custody or possession. The ruling of the trial Court (R. 610), affirmed by the Court of Appeals (R. 642), required compliance of each petitioner who "alone or in concert . . . had custody or control over such records." It has consistently been held that a subpoena *duces tecum* need be complied with only where actual custody is had of the documents requested; a party thus subpoenaed need not "sue and labor" to obtain books and records he does not possess. *Amey* v. *Long,* 9 East 473 (K. B. 1808); *Munroe* v. *United States,* 216 Fed. 107 (C. C. A. 1, 1914); *In re Ironclad Mfg. Co.,* 201 Fed. 66 (C. C. A. 2, 1912); *United States* v. *American Tobacco Co.,* 146 Fed. 557 (S. D. N. Y. 1906); *In re Sykes,* 23 Fed. Cas. 13,707 (S. D. N. Y. 1878); *Russell* v. *McLellan,* 21 Fed. Cas. 12,158 (D. Me. 1847); *Commonwealth* v. *International Harvester Co.,* 148 Ky. 37,

145 S. W. 1132 (1912); see *Brown* v. *United States,* 276 U. S. 134, 142 (1928). The extension of the foregoing principle introduces uncertainty and the possibility of "shotgun" techniques into a field heretofore clearly and simply understood. The dictum of this Court in *Wilson* v. *United States,* 221 U. S. 361, 374, 376 (1911), relied upon by the United States Court of Appeals for the District of Columbia, has never been and should not be extended to the members of an unincorporated association or to a process which issues *ex parte* such as a subpoena *duces tecum.* Cf. *Commissioners* v. *Sellew,* 99 U. S. 624 (1879).

11. The United States Court of Appeals for the District of Columbia held (R. 643) that the trial Court was correct in submitting to the jury the issue of aiding and abetting, and was correct in its charge as to that issue (R. 610). This decision is in conflict with the applicable decisions of this Court. Aiding and abetting was not charged in the indictments (R. 2-6), it was not part of the prosecution or defense, and it was not in the Government's prayer for instructions (R. 595-597). The issue of aiding and abetting should therefore not have been submitted to the jury. *Cole* v. *Arkansas,* 16 U. S. Law Week 4215 (decided March 8, 1948); *DeJonge* v. *Oregon,* 299 U. S. 353, 362 (1937). Upon submission of the issue, the jury should have been charged that the aider cannot be guilty unless there is a principal who has committed the substantive crime. *United States* v. *Howitt,* 328 U. S. 189 (1946); *Yenkichi Ito* v. *United States,* 64 F. (2) 73 (C. C. A. 9, 1933) *cert. den.* 289 U. S. 762 (1933). As the issue was left with the jury, petitioners may have been convicted for aiding and abetting although none of them committed the alleged contempt; for aiding and abetting Helen Bryan although the commission of the crime by her was not here charged or proven; or for aiding and abetting Dr. Barsky when he testified on February 13, 1946, although it was not charged (R. 5) that he committed the crime of contempt upon that date.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

EDWARD K. BARSKY, JACOB AUSLANDER, LYMAN R. BRADLEY, MARJORIE CHODOROV, HOWARD FAST, HARRY M. JUSTIZ, RUTH LEIDER, JAMES LUSTIG, MANUEL MAGANA, LOUIS MILLER, CHARLOTTE STERN,

Petitioners.

O. JOHN ROGGE,
WOLF, POPPER, ROSS & WOLF,
Attorneys for Petitioners.

MURRAY A. GORDON,
HERBERT J. FABRICANT,
ROBERT H. GOLDMAN,
LESTER LEVIN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No.

EDWARD K. BARSKY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinions of the District Court are reported at 7 F. R. D. 38 (1947) (R. 14-17); 72 Fed. Supp. 58 (1947) (R. 614-624); and 72 Fed. Supp. 165 (1947) (R. 23-31). The opinion of the United States Court of Appeals for the District of Columbia (R. 632-655) is unreported.

Jurisdiction

The bases for this Court's jurisdiction are set forth in the petition (p. 9).

Specifications of Errors

1. The United States Court of Appeals for the District of Columbia erred in failing to reverse the convictions of

petitioners upon the ground that the Resolution is unconstitutional.

2. The United States Court of Appeals for the District of Columbia erred in failing to reverse the conviction of petitioners upon the ground that the trial Court improperly admitted into evidence the testimony of petitioners before the House Committee.

3. The United States Court of Appeals for the District of Columbia erred in failing to reverse the conviction of petitioners upon the ground that the trial Court improperly excluded evidence offered by petitioners as to the pertinency of the books and records summoned.

4. The United States Court of Appeals for the District of Columbia erred in failing to reverse the convictions of petitioners upon the grounds that the indictment failed to state an offense against the United States; that the proof failed to establish the commission of such an offense; and that the trial Court improperly charged the jury.

The specifications of error are set out in detail in the questions presented in the petition.

Summary of Argument

The argument in this brief is confined to the reasons why this Court should hear and decide the constitutional questions presented and the question presented as to Section 634 of Title 28 of the United States Code. The reasons urged with respect to the other issues are set forth in the petition.

Petitioners have standing to challenge the unconstitutionality of the Resolution. The purpose and effect of the Resolution is not inquiry preparatory to legislation but the abridgement of freedoms guaranteed by the First Amendment to the United States Constitution. This is

accomplished by authorizing the House Committee to inquire into, to compel public disclosure of, and to stigmatize individuals and organizations for their opinions and expressions. As construed and applied to petitioners, the Resolution impaired petitioners' constitutional right to be free from such inquiry, disclosure and stigmatization for their views and speech. The abridgement of the rights of petitioners and others by the Resolution violates the First Amendment since the matter which is made the subject of investigation presents no clear and present danger to a paramount public interest. The investigation does not serve a paramount public interest constitutionally sufficient to warrant the abridgements authorized by the Resolution. Even if the House Committee investigation includes matters which may constitutionally be abridged by inquiry, still the Resolution violates the First Amendment since it is so vague that, on its face and on the record herein, the Committee is authorized to and does investigate and abridge opinion, speech, press and assembly investigation of which does not serve any paramount public interest. The vagueness of the key terms of the Resolution also deprives petitioners of rights under the Fifth and Sixth Amendments to the United States Constitution in that the Resolution did not provide them with adequate standards whereby petitioners could determine in advance whether the non-production of the documents demanded constituted the crime of contempt. And the Resolution, as an investigation into the private affairs of private persons, violates the Ninth and Tenth Amendments to the United States Constitution in that it is not plausibly related to prospective valid legislation as required by *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881). The admission of petitioners' testimony before the House Committee at the trial was prejudicial error. Section 634 of Title 28, United States Code, expressly interdicts the use of the testimony of a witness before a Congressional committee in a subsequent criminal proceeding.

ARGUMENT

I

The United States Court of Appeals for the District of Columbia has decided a question of general importance, relating to the construction of the Constitution and of the Resolution, which has not been, but should be, settled by this Court.

This Court has heretofore stricken down local, desultory and minor inhibitions of rights guaranteed by the Bill of Rights lest precedents be established to sanction more serious inhibitions. Now this Court is confronted with a Resolution imposing endemic restrictions, epidemic in scope, upon civil liberties. This case involves not only the loss of liberty and livelihood by the eleven petitioners,[1] but a permanent-session inquisition into the opinions and speech of individuals and organizations of every conceivable political, economic, religious, racial and social orientation. "Nothing can be more repugnant to the true genius of the common law than such an inquisition as has been mentioned into the consciences of men . . ." (Alexander Hamilton, quoted at *Cummings* v. *Missouri*, 71 U. S. 277, 331 (1867)). To the restraints upon opinion and expression occasioned by inquisition under the Resolution, the House Committee has added the technique of trying and convicting in the public press—without judicial trial or safeguards—those it finds guilty of harboring "un-American" or "subversive" views thus substituting ". . . for the established and legal mode of investigating crimes and inflicting forfeitures, one that is unknown to the Constitution, and repugnant to the genius of our law" (*id.*, at 332). The validity

[1] The petitioners are comprised of three physicians; two lawyers; two educators; one author; one labor leader; one merchant; and one housewife (R. 564-571, 575-578, 581-584).

of the Resolution which authorizes all of the foregoing is put in issue in the instant prosecution.

Petitioners have standing to raise every aspect of the constitutionality of the Resolution.

In response to the mandates issued by the House Committee, petitioners appeared, took the oath, and answered questions asked of them (Gov. Ex. 6). The default charged occurred at that point at which compliance would have entailed a violation of petitioners' constitutional rights.[2] To have produced the books, records and correspondence sought would have been to disclose matters which petitioners had a constitutional right not to disclose (see pp. 29 to 32, *infra*). The investigation and this prosecution of petitioners by the House Committee are jurisdictionally premised upon the pertinency of the activities of petitioners and of the summoned books, records and correspondence to "propaganda activities" (R. 230, 235-240, 607). The House Committee Report of June, 1946 (Gov. Ex. 33 at pp. 18-73, R. 491), the questions asked petitioners at Committee hearings (Gov. Ex. 2, R. 421; Gov. Ex. 6, R. 400), and the Committee's interest in JAFRC correspondence, contributors and donees all indicate that petitioners were being investigated and the books, records and correspondence were demanded in order to compel public disclosure of petitioners' opinions, expressions, and associations and that the House Committee contemplated the "exposure" of petitioners in the public press for those views and expressions. Production of the documents demanded would not only have subjected petitioners to judicially irremediable consequences (*Hearst* v. *Black*, 87 F. (2) 68 (App. D. C. 1936); *Spalding* v. *Vilas*, 161 U. S. 483 (1896); *Mellon* v. *Brewer*, 18 F. (2) 168 (App. D. C. 1927), *cert. den.* 275 U. S. 530 (1927); *Cresson* v.

[2] Cf. *Josephson* v. *United States*, 165 F. (2) 82, 90 (C. C. A. 2, 1947) *cert. den.* 333 U. S. —— (decided on Feb. 16, 1948). The witness there refused to take the oath so that the witness may not have been confronted with the alternatives, presented to the petitioners here, of contempt and the immediate impairment of constitutional rights.

Louisville Courier-Journal, 299 Fed. 487 (C. C. A. 6, 1924)), but would have left petitioners with no opportunity to assert the claim that they were being deprived by the Committee of constitutional rights (see Note, 14 *U. of Chic. Law Rev.* 256, 263-269 (1947)). Petitioners were not obliged to forego their constitutional rights under the First, Fifth, Ninth and Tenth Amendments not to produce the documents in order to test the constitutionality of the Resolution. *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); see *Jones* v. *Opelika*, 316 U. S. 584, 600, 602 (1942).

The question of the constitutionality of the Resolution under the Fifth and Sixth Amendments to the United States Constitution is squarely raised by the facts in this case. This prosecution is for a failure by petitioners "to produce papers upon any matter under inquiry" (2 U. S. C. § 192) (R. 2-6). Petitioners were not required to produce the books and records demanded if those documents were not pertinent to the matter put under inquiry by the Resolution. *McGrain* v. *Daugherty*, 273 U. S. 135, 176 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929); *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 25 (1936). The demand made of petitioners necessitated a judgment by them, at the risk of committing the crime of contempt, as to the meaning of the terms "un-American," "subversive," and "the principle of the form of government as guaranteed by our Constitution."[3] Petitioners refused to produce the summoned books, records, and correspondence because, *inter alia*, they considered that the JAFRC ". . . is truly American in every sense of the word and can, by no stretch of the imagination, be considered Un-American,

[3] Compare *Josephson* v. *United States*, 165 F. (2) 82, 87-88 (C. C. A. 2, 1947) *cert. den.* 333 U. S. —— (1948), where it was held that the witness was not required to ascertain the meaning of the key terms of the Resolution in order to determine whether he was obliged to take the oath since the witness had no problem as to whether the oath he was asked to take was pertinent to "un-American propaganda activities."

subversive, or an attack upon the principles of our form of Government" (Gov. Exs. 36-A, 36-B, R. 541, 543). The petitioners were, therefore, required to and did make a determination as to the meaning of the terms of the Resolution and are here being persecuted for that determination. Under such circumstances, the question of whether those terms provided an adequate and ascertainable standard of guilt is raised here.

II

The Resolution Is Unconstitutional

The doctrine of the supremacy of law applies to Congressional investigations as well as to any other type of Congressional action. The Resolution establishing the House Committee, and the investigation conducted pursuant thereto, must conform with the Constitution and it is the function of the courts to determine whether such conformance obtains. *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881); *McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929).

A

The Resolution violates the First Amendment to the Constitution of the United States.

That the investigation into "propaganda activities" authorized by the Resolution and conducted by the House Committee abridges speech, press and assembly, including the freedom of speech of petitioners, is acknowledged by the majority and dissenting opinions of the Court of Appeals; nor is it disputed that the First Amendment limits the Congressional investigatory power. R. 639-640, 695; cf. *Colonial Sugar Refining Co.* v. *Attorney General*, 15

Commonwealth L. R. 182 (1912) *rev'd* L. R. [1914] App. Cas. 237; *Greenfield* v. *Russel,* 292 Ill. 392, 127 N. E. 102 (1920); see *Jones* v. *Opelika,* 316 U. S. 584, 600, 609 (1942).

Public inquiries into matters of opinion and expression protected by the First Amendment are prohibited by that Amendment.[4] *United States* v. *Ballard,* 322 U. S. 78 (1944), see *Cummings* v. *Missouri,* 71 U. S. 277, 331 (1867). As stated in the dissent of EDGERTON, *J.*, "No one denies that the inquest is an effective instrument of restraint" (R. 651). The House Committee inquiry, motivated by "sheer animosity and excited partisanship" (Ehrmann, "The Duty of Disclosure in Parliamentary Investigation" 11 *U. of Chic. Law Rev.* 1, 117, 150 (1944)) and conducted in a manner violative of procedural due process (see *Ogden, The Dies Committee,* c. IV, VIII, IX, XIII, XVII (2 ed. 1945); *Gellerman, Martin Dies,* c. 4, 5 (1944); *Cushman, Safeguarding Our Civil Liberties,* 7-8 (1943); 94 Cong. Rec. 2487, 2490, 2493, 2495 (1948); Notes, 96 *U. of Penn. Law Rev.* 381, 395 (1948); 14 *U. of Chic. Law Rev.* 256, 263 (1947); 47 *Columbia Law Rev.* 416, 428 (1947); *N. Y. Times,* Oct. 8, 1947, p. 7, col. 5 (RIFKIND, *J.*); *N. Y. Herald Tribune,* March 14, 1948, p. 22 cols. 6-8 (Archibald MacLeish)), is such "an effective instrument of restraint."

Compulsory public disclosure of constitutionally guaranteed opinion and expression is another aspect of the Committee's activities which is limited by the First Amend-

---

[4] Prior to the adoption of the First Amendment, at the trial of Anne Hutchinson in 1637 before the General Court at Newton in the Province of Massachusetts-Bay, the following colloquy occurred:

> "*Gover.* Only I would add this. It is well discerned to the court that Mrs. Hutchinson can tell when to speak and when to hold her tongue. Upon the answering of a question which we desire her to tell her thoughts of she desires to be pardoned.
>
> *Mrs. H.* It is one thing for me to come before a public magistracy and there to speak what they would have me to speak and another when a man comes to me in a way of friendship privately there is difference in that."

(*Abramowitz, The Great Prisoners* 316 (1946).)

ment. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943). The compulsory public disclosure of unorthodox opinions and speech is a patent restraint thereupon. Under the Resolution the House Committee not only restrains the unorthodox by compulsory disclosures but, also, restrains more orthodox views or speech by publicly characterizing any individual or organization[8] distasteful to the House Committee as "subversive," "un-American," or "communistic" (H. Report 2277, 77th Cong., 2nd Sess., Minority Report 4, 7 (1942)).

Speech is restrained and impaired if the speaker is subject to Congressional inquiry, to compulsory public disclosure, and to stigmatization because of his opinions and his speech.

Although the Resolution, on its face and as construed and applied herein, abridges speech, press and assembly, neither the expression which is the subject matter of the Resolution nor the expression or activities of the petitioners creates a clear and present danger to any substantive public interest (R. 636-637). Under such circumstances the Resolution violates the First Amendment. *Schenck* v. *United States*, 249 U. S. 47 (1919); *Bridges* v. *California*, 314 U. S. 252 (1941); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

It is immaterial that the Resolution does not in terms provide for "direct and candid efforts to stop speaking or publication as such." *Thomas* v. *Collins*, 323 U. S. 516, 547 (1945). "The House Committee's enabling Act concerns, specifically and exclusively, 'propaganda activities', and the Committee's principal purpose is to restrain them" (EDGERTON, *J.*, at R. 647). The decisions of this Court applying the clear and present danger test make no exception for

[8] See, *e. g.*, Gellhorn, "Report on a Report of the House Committee on Un-American Activities," 60 *Harvard Law Rev.* 1193 (1947).

abridgements by investigation.[6] It is the right impaired and not the limitation which requires that test to be applied. *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945).

The revenue power (*Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943); *Grosjean* v. *American Press Company,* 297 U. S. 233 (1936)), the police power (*Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940)), the judicial injunctive and contempt power (*Cafeteria Employees Union* v. *Angelos,* 320 U. S. 293 (1943); *Bridges* v. *California,* 314 U. S. 252 (1941)), the denaturalization power (*Schneiderman* v. *United States,* 320 U. S. 118 (1943); *Baumgartner* v. *United States,* 322 U. S. 665 (1944)), the deportation power (*Bridges* v. *Wixon,* 326 U. S. 135 (1945)), and even the power to preserve the safety of the Government (*Hartzel* v. *United States,* 322 U. S. 680 (1944); *Stromberg* v. *California,* 283 U. S. 359 (1931); *DeJonge* v. *Oregon,* 299 U. S. 353 (1937); *Herndon* v. *Lowry,* 301 U. S. 242 (1937); *Taylor* v. *Mississippi,* 319 U. S. 583 (1943)), are all limited by the rule that they may not constitutionally be employed to abridge any speech, press or assembly which creates no "grave and immediate danger to interests which the state may lawfully protect." *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943). The exception carved out by the United States Court of Appeals for the District of Columbia for the investigatory power creates "a blank spot in the protective covering"[7] of the Bill of Rights.

---

[6] "To the general observation that an agency having authority to make an investigation may compel disclosure of all information relevant to the investigation, irrespective of the scope of the agency's regulatory power, an exception must be noted to the effect that when the purpose of compelling a disclosure is not to secure information for governmental purposes but is to use the power of compelling the disclosure as a sanction for producing a desired regulatory effect, the agency's action is necessarily limited by the scope of its regulatory power. If the agency may not regulate, it may not regulate by using publicity as a sanction." Davis, "The Administrative Power of Investigation," 56 *Yale Law J.* 1111, 1136 (1947).

[7] *Josephson* v. *United States,* 165 F. (2) 82, 93 (C. C. A. 2, 1947), *cert. den.* 333 U. S. —— (1948) (CLARK, *J.*, dissenting).

The exception cannot be justified on the grounds that the abridgement of constitutional rights is a tangential incident of Congressional investigation. Regulation of freedoms guaranteed by the First Amendment is the objective not a by-product of the Resolution. The Resolution was re-enacted without change annually after 1938 over objections to and criticisms of the House Committee practices (83 Cong. Rec. 7567-7686 (1938); 84 Cong. Rec. 1098-1128 (1939); 86 Cong. Rec. 572-605 (1940); 87 Cong. Rec. 886-900 (1941); 88 Cong. Rec. 2282-2297 (1942); 89 Cong. Rec. 721-729, 795-810 (1943); 91 Cong. Rec. 10-14 (1945); 92 Cong. Rec. 7720-7728 (1946); 94 Cong. Rec. 2483-2496 (1948)) so that the Committee practices have been incorporated into the Resolution. *Poe* v. *Seaborn*, 282 U. S. 101 (1930); *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110 (1939); *United States* v. *Cerecedo Hermanos y Co.*, 209 U. S. 337 (1908); *National Lead Co.* v. *United States*, 252 U. S. 140 (1920); *Boehm* v. *Commissioner of Internal Revenue*, 326 U. S. 287 (1945); *Douglas* v. *Commissioner of Internal Revenue*, 322 U. S. 275 (1944); *Merchants National Bank* v. *Commissioner of Internal Revenue*, 320 U. S. 256 (1943). Consequently, the considerations which may obtain where a Congressional committee incidentally inquires into matters of opinion and expression in the course of an investigation preparatory for legislation are not here involved since the history of the House Committee, which has been infused into the Resolution, reveals that the House Committee is investigating "propaganda activities" not as a preface to legislation but for the purpose of fixing and enforcing standards of political, economic and social orthodoxy in violation of the First Amendment. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Thomas* v. *Collins*, 323 U. S. 516, 544, 545 (1945).

Nor are the abridgements caused by the House Committee necessary incidents of Congressional investigation. Any need for Congress to inquire ". . . to discover

whether there is clear and present danger, could be authorized[8] and could be conducted[9] without violating the First Amendment" (EDGERTON, *J.*, at R. 651).

Even the objective of the House Committee investigation as construed by the United States Court of Appeals for the District of Columbia (R. 637) is not constitutionally sufficient to counter-balance "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945). The impairment by the House Committee investigation of speech, press and assembly which threaten no clear and present danger is a greater jeopardy to the security and stability of the nation than the views and expressions investigated. *Stromberg* v. *California,* 283 U. S. 359, 369 (1931); *Near* v. *Minnesota,* 283 U. S. 697, 721 (1931); *DeJonge* v. *Oregon,* 299 U. S. 353, 365 (1937); *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 636 (1943). Any actual, attempted or potential threat to the national security caused by the "propaganda activities" investigated by the House Committee is already the subject matter of adequate police investigation and criminal sanctions. 18 U. S. C. §§ 1-17, 21-39, 51-61, 71-151; 50 U. S. C. § 31.

The United States Court of Appeals for the District of Columbia held "no more than that" Congress could authorize the House Committee "to make an inquiry of an individual which may elicit the answer that the witness is a believer in Communism or a member of the Communist Party" (R. 641). But no such inquiry was here made nor was the issue presented to the Court of Appeals in terms of such an inquiry. The Resolution was attacked by petitioners on "the larger question whether courts may punish

---

[8] See Note, 47 *Columbia Law Rev.* 416, 421 n. 57 (1947).

[9] See Wyzanski, "Standards for Congressional Investigations," 3 *New York City Bar Ass'n.* 93, 106 (1948); *New York Herald Tribune,* April 19, 1948, p. 12, col. 3; H. R. 4564, 80th Cong., 1st Sess. (1947); 94 Cong. Rec. 2413, 2490 (1948).

individuals for not responding to an inquiry by this Committee into their political opinions" (EDGERTON, *J.*, R. 655). Under the Resolution and upon the record in this case, petitioners may have been investigated for other than communist opinions and speech. The House Committee has not confined its inquiries and "exposures" to communism but has, instead, covered ". . . such diverse groups . . . as the American Civil Liberties Union, the C. I. O., the National Catholic Welfare Conference, the American League for Peace and Democracy, the Farmer-Labor Party, sitdown strikes, the Federal Theatre Project, consumers' organizations, the Union for Democratic Action, the magazine Time, the Daily Worker, the Joint Anti-Fascist Refugee Committee, the National Federation for Constitutional Liberties, and the National Council of American-Soviet Friendship. This list is illustrative of the almost unlimited variety of the Committee's investigations." Note, 47 *Columbia Law Rev.* 416, 418 (1947). Irrespective of the claim of Congressional power to investigate communism, the Resolution infringes upon the First Amendment since, on its face and as construed and applied, the Resolution is so vague and indefinite that it authorizes the abridgement of opinion, speech, press and assembly of petitioners and others which are indisputably constitutionally inviolate. *Winters* v. *New York,* 16 U. S. Law Week 4279 (decided on March 29, 1948); *Musser* v. *Utah,* 333 U. S. 95 (1948); *Thomas* v. *Collins,* 323 U. S. 516 (1945); *Martin* v. *Struthers,* 319 U. S. 141 (1943); *Jamison* v. *Texas,* 318 U. S. 413 (1943); *Bridges* v. *California,* 314 U. S. 252 (1941); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Carlson* v. *California,* 310 U. S. 106 (1940); *Schneider* v. *Irvington,* 308 U. S. 147 (1939); *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Herndon* v. *Lowry,* 301 U. S. 242 (1937); *DeJonge* v. *Oregon,* 299 U. S. 353 (1937); *Stromberg* v. *California,* 283 U. S. 359 (1931).

The majority opinion of the United States Court of Appeals for the District of Columbia suggests that the

abusive applications of the Resolution by the House Committee may be judicially disregarded as superfluities to be exorcized by the Congress. But the abuses and abridgements by the Committee have been integrated by re-enactment into the Resolution and it is a proper function of this Court to provide relief therefrom. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943). It has been stated on the floor of the Congress that ". . . a large number of us are afraid to vote against the Dies committee. Afraid to vote our honest conviction because we are afraid of the misconceptions and false impressions which that committee, through abundant publicity, has built up in the American public." 89 Cong. Rec. 803 (1943) (Rep. Gale); see also Note, 14 *U. of Chic. Law Rev.* 256, 266 (1947).

B

The Resolution violates the Fifth and Sixth Amendments to the United States Constitution.

The key term of the Resolution is "un-American propaganda activities." The opinions in the Court below indicate that the term "un-American" is vague and indefinite[10] (R. 637-638, 653-654), and apparently, the term "subversive" as it appears in the Resolution was similarly deemed by the Court of Appeals to be vague and indefinite.[11] But the majority opinion concluded that the Resolution was a valid delegation of power by the Congress to the House Committee since the instruction therein to investigate

[10] The chief counsel for the House Committee wrote in 1946:

"The committee has adopted no definition of subversive or un-American activities." (92 Cong. Rec. App. 4743 (1946); see also 81 Cong. Rec. 3285 (1937).)

[11] In *Winters* v. *New York*, 16 U. S. Law Week 4279, 4282 (1948), this Court indicated that it considers "subversive activities" too indefinite as a standard of guilt.

propaganda which "attacks the principle of the form of government as guaranteed by our Constitution" ". . . .is definite enough . . ." (R. 638). Irrespective of whether this clause of the Resolution is definite enough to constitute a delegation of power by the Congress to the House Committee, the same clause failed to convey to this Court any clear or fixed meaning in *Schneiderman* v. *United States,* 320 U. S. 118 (1943).

Guilt or innocence of the action of witnesses before the House Committee depends upon the meaning of the key terms of the Resolution. For it is necessary to refer to the Resolution in order to determine whether petitioners committed a crime under Section 192, Title 2 of the United States Code. The Resolution provides the standard of guilt under Section 192 and, accordingly, the Resolution must conform with the constitutional requirements of definiteness and certainty which pertain to any penal law. *Kraus & Bros.* v. *United States,* 327 U. S. 614 (1946). The Resolution fails to meet those requirements and thereby violates the Fifth and Sixth Amendments to the United States Constitution.[12] *Kraus & Bros.* v. *United States,* 327 U. S. 614 (1946); *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Cline* v. *Frink Dairy Co.,* 274 U. S. 445 (1927); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81 (1921); *United States* v. *Reese,* 92 U. S. 214 (1875). This defect in the Resolution may not be cured by judicial construction. *United States* v. *Reese,* 92 U. S. 214 (1875); *Butts* v. *Merchants & Miners Transportation Co.,* 230 U. S. 126 (1913); *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500 (1926); *United States* v. *Sullivan,* 332 U. S. 689, 693 (1948). And since the compulsion to answer pertinent questions here affects constitutional rights of petitioners, the Resolution on

[12] In the *Josephson* case the majority did not pass on the definiteness of the Resolution (165 F. (2), 87), while the dissent found it to be too vague under the First, Fifth and Sixth Amendments (*id.,* at 95-97). EDGERTON, *J.,* dissenting herein, also could find no fixed or definite meaning for the terms of the Resolution individually or collectively (R. 653-655).

its face, and without assistance of judicial construction, should provide a narrowly drawn standard of guilt. *Winters* v. *New York*, 16 U. S. Law Week 4279 (1948); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Stromberg* v. *California*, 283 U. S. 359 (1931). The subsequent judicial determination that the demand by the House Committee upon petitioners was pertinent does not supply the Resolution with the clearly defined standard of guilt to which petitioners were constitutionally entitled in advance of their appearance before the House Committee. 26 Cong. Globe, 34th Cong., 3rd Sess. 439 *et seq.* (1857); 8 *Wigmore, Evidence* § 2195, p. 80 (3 ed. 1940); Gose, "The Limits of Congressional Investigating Power" 10 *Washington Law Rev.* 61, 138, 153 (1935); Note, 47 *Columbia Law Rev.* 416, 425 (1947).

C

The Resolution violates the Ninth and Tenth Amendments to the United States Constitution.

A basic constitutional right is the "exemption of [one's] private affairs, books, and papers from the inspection and scrutiny of others." *In re Pacific Railway Commission*, 32 Fed. 241, 250 (N. D. Cal. 1887) (FIELD, *J.*); *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881); *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1 (1936). The Congressional power of investigation has, accordingly, been circumscribed by the limits first prescribed in *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881). Like other implied powers, the Congressional power of investigation "is a means to an end and not the end itself"; it "rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred." *Marshall* v. *Gordon*, 243 U. S. 521, 541 (1917); see also *Sinclair* v. *United States*, 279 U. S. 263, 291 (1929); *McGrain* v.

Daugherty, 273 U. S. 135, 173 (1927); *In re Chapman*, 166 U. S. 661, 667 (1897); *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613 (1929); *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376, 388 (1928).

The constitutional functions of the Congress which may be assisted by investigation include: control by the Congress of its members (Art. I, § 5, Cl. 1, 2); impeachment (Art. I, § 3, Cl. 6); the power to make the appropriations required for the administration of the laws (Art. I, § 7, Cl. 1); and the formulation of legislation (Art. I, § 8). Investigations into elections or corruption of legislators (*In re Chapman*, 166 U. S. 661 (1897); *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376 (1928); *Barry* v. *United States*, 279 U. S. 597 (1929)) and into the affairs of public officials or departments to determine whether the laws are properly administered (*McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929)) were not, in scope and in purpose, investigations into the private affairs of private persons although inquiry into those private affairs may have been incidental thereto. But where the objective of an investigation is future general legislation, then the scope of the investigation may be defined in terms of the private affairs of private citizens.

Kilbourn v. *Thompson*, 103 U. S. 168 (1881), is the only instance where this Court considered an investigation which has for its defined scope the private affairs of private citizens. It was there held that if the investigation is such "that it could result in no valid legislation on the subject to which the inquiry referred," the investigation would be declared "void for want of jurisdiction in that body." *Kilbourn* v. *Thompson*, 103 U. S. 168, 193, 196 (1881). Such a void investigation was held to be without the constitutional grant of power to the Congress contained in Article I, Section 1 or Article I, Section 8, Clause 18 and therefore in derogation of the powers reserved to the

people and to the States by the Ninth and Tenth Amendments.

Kilbourn v. *Thompson* has never been overruled by this Court.

The scope of the investigation authorized by the Resolution is an unlimited inquiry into the private affairs of private persons and the Resolution is therefore unconstitutional because it does not relate directly to prospective valid legislation. It is not sufficient that the investigation may result in some valid legislation wholly incommensurate with its scope. *Eberling, Congressional Investigations* 383 (1928). The investigation considered in *Kilbourn* v. *Thompson*, as any investigation, contained some possibility of future legislation.[13] The right of security for the private affairs of private citizens prohibits an extensive Congressional inquiry into those matters on the slight pretext of a mere possibility of future legislation. The only legislation to which the House Committee investigation is plausibly related is legislation affecting political expression and opinion. The remarkable paucity of legislation produced by this Committee and its predecessors[14] is indicative of what may be expected in the future. For that paucity of legislation is not due to any lack of diligence on the part of the House Committee; the real block is the Bill of Rights. The House Committee has repeatedly stated that the objective of the House Committee is not to produce legislation but to accomplish by publicity and "exposure" what it could not constitutionally accomplish by legislation.[15] An investigation which, at best, abridges speech in an effort to determine whether and what speech

---

[13] See Landis, "Constitutional Limits on the Congressional Power of Investigation," 40 *Harvard Law Rev.* 153, 216-217 (1926).

[14] See Notes, 96 *U. of Penn. Law Rev.* 381, 396 (1948); 14 *U. of Chic. Law Rev.* 256, 259 (1947); 47 *Columbia Law Rev.* 416, 427 n. 109 (1947); 94 Cong. Rec. 2495 (1948).

[15] See Note, 47 *Columbia Law Rev.* 416, 427 n. 110 (1947).

may be abridged is in violation of the Ninth and Tenth Amendments.

* * * * * *

Petitioners in urging the unconstitutionality of the Resolution do not thereby urge this Court to weaken but to fortify the Congressional investigatory power. In a democracy, public confidence in the integrity and fairness of an institution of Government is essential if that institution is to be vital and effective. "Friends and supporters of the congressional power may well fear its present exercise here and find the application of a proper restraint a source of strength in the long run, rather than the reverse. For a widespread belief that the Committee is acting in an Un-American way to even an American end will destroy the Committee's usefulness in the eyes of 'a liberty-loving people.' "[16]

III

It was reversible error for the trial Court to admit into evidence petitioners' testimony before the House Committee.

Section 634, Title 28 of the United States Code provides that no testimony given by a witness before a Congressional committee shall be used against him in a subsequent criminal prosecution except in a prosecution for perjury committed in the giving of such testimony. Upon the trial herein a transcript of petitioners' testimony before the House Committee (Gov. Ex. 6) was admitted into evidence and read to the jury over objections (R. 23-31, 38, 370, 400).

Section 634 is, on its face, available to petitioners. It does not require petitioners to assert a claim of privilege. *United States* v. *Monia*, 317 U. S. 424 (1943); *Jacobs* v.

---

[16] *Josephson* v. *United States*, 165 F. (2) 82, 100 (C. C. A. 2, 1947), *cert. den.* 333 U. S. —— (1948) (CLARK, *J.*, dissenting).

United States, 161 Fed. 694 (C. C. A. 1, 1908); *Alkon* v. *United States*, 163 Fed. 810 (C. C. A. 1, 1908); 8 *Wigmore, Evidence* § 2283, p. 529 (3 ed., 1940). Upon a claim of privilege, petitioners could not have been compelled to testify (*Counselman* v. *Hitchcock*, 142 U. S. 547 (1892); *United States* v. *DeLorenzo*, 151 F. (2) 122 (C. C. A. 2, 1945)) so that Section 634 is applicable only to instances where the privilege is not asserted.

The Court below affirmed (R. 642-643) the decision of the trial Court to read another exception into Section 634 for contempt, "or conspiracy leading to contempt" (R. 31). The decision of the trial Court rested upon the premise that if testimony before a Congressional committee is not admissible in a contempt prosecution, the prosecution will fail for lack of proof (R. 29).

The error in this argument is readily apparent when it is considered that the Government has proceeded for contempt against witnesses who have stood mute. In the case at bar, the Government has attempted, by offering evidence other than that of the petitioners' testimony, to prove independently the non-production of the books and records sought by the Committee (R. 230) thereby indicating that the Government is not precluded from proving the charged default where the constitutionally-derived protection afforded witnesses by Section 634 is respected.

That the admission into evidence of the testimony of the defendants would assist the Government in this prosecution is no basis for depriving petitioners of the safeguards contained in Section 634. In *Cameron* v. *United States*, 231 U. S. 710 (1914), testimony of the bankrupt in one bankruptcy proceeding was offered to prove that the bankrupt had committed perjury in another subsequent bankruptcy proceeding. A statute similar to Section 634 was invoked by the accused with respect to the prior testimony. The Supreme Court held the testimony, which would have been

of assistance to the perjury prosecution, to be inadmissible. And it has also been held that testimony under a statute such as Section 634 is inadmissible in a subsequent prosecution to test the credibility of the witness (*Jacobs* v. *United States,* 161 Fed. 694 (C. C. A. 1, 1908); *Alkon* v. *United States,* 163 Fed. 810 (C. C. A. 1, 1908)); or to aid a subsequent prosecution against a witness for criminal contempt (*Wakefield* v. *Housel,* 288 Fed. 712 (C. C. A. 8, 1923); *In re Haley,* 41 F. (2) 379 (S. D. Cal., 1930)).

The exception in Section 634 for perjury provides no analogy for this contempt prosecution. That exception is necessary for otherwise the only possible evidence of a crime committed by the testimony would be unavailable. The crime of contempt—especially where, as here, the alleged contempt is the refusal to produce certain books and records and not the testimony given at the hearing—can be proven independently of the testimony. The admission of the testimony given before the House Committee into evidence went far beyond any exceptions to Section 634 which might obtain for testimony necessary to prove a crime committed by that testimony; the testimony admitted here was evidence not of the commission of the alleged contempt, it was heated colloquy between the witnesses and the House Committee given under conditions unfavorable and provocative to the witnesses. Consequently, the perjury exception of Section 634 does not extend to this contempt prosecution and the case of *Glickstein* v. *United States,* 222 U. S. 139 (1911), relied upon by the trial Court (R. 26), is not here apposite. Note, 15 *U. of Chic. Law Rev.* 442 (1948). Indeed, the reading of an exception for the contempt here alleged into Section 634 tends to defeat the efficacy of Congressional investigating committees. Anything which discourages witnesses from testifying, which compels reliance upon claims of immunity, hampers the activities of such committees.

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia involves important questions relating to the Constitution and to federal statutes which have not been, but should be, settled by this Court. Federal questions have been decided in a way probably in conflict with applicable decisions of this Court. Wherefore, the petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia to review its judgment and decree.

Respectfully submitted,

O. JOHN ROGGE,
WOLF, POPPER, ROSS & WOLF,
Attorneys for Petitioners.

MURRAY A. GORDON,
ROBERT H. GOLDMAN,
HERBERT J. FABRICANT,
LESTER LEVIN,
Of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and resolution involved	3
Statement	5
Argument	12
Conclusion	21

CITATIONS

Cases:	
Bozza v. *United States*, 330 U. S. 160	20
Collins v. *United States*, 20 F. 2d 574	20
Fields v. *United States*, 164 F. 2d 97, certiorari denied, 332 U. S. 851	21
Glickstein v. *United States*, 222 U. S. 139	16
Harris v. *United States*, 273 Fed. 785, certiorari denied, 257 U. S. 646	20
Heike v. *United States*, 227 U. S. 131	16
Jin Fuey Moy v. *United States*, 254 U. S. 189	20
Josephson v. *United States*, No. 535, this Term, certiorari denied, March 15, 1948	12, 21
Melling v. *United States*, 25 F. 2d 92	20
Nardone v. *United States*, 308 U. S. 338	16
Sinclair v. *United States*, 279 U. S. 263	21
United States v. *Josephson*, 165 F. 2d 82, certiorari denied, February 16, 1948, rehearing denied, March 15, 1948, No. 535, this Term	12
Statutes:	
Revised Statutes § 102, as amended, 52 Stat. 942, 2 U. S. C. 192	3
Revised Statutes § 859, as amended, 52 Stat. 943, 28 U. S. C. 634	3, 14, 15, 17
18 U. S. C. 550	20
Miscellaneous:	
House of Representatives Rule XI (q) (2), as amended by Section 121 (b) of the Legislative Reorganization Act of 1946, Pub. L. No. 601, 79th Cong., 2d Sess., 60 Stat. 812, 828 (adopted by the House of Representatives, 80th Congress, H. Res. No. 5, 80th Cong., 1st Sess.)	4, 13

789860—48——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 766

EDWARD K. BARSKY ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 632–643) and dissenting (R. 644–655) opinions in the court of appeals are not yet reported. The opinion of the district court denying the motion for a bill of particulars (R. 14–17) appears at 7 F. R. D. 38; the opinion denying the motion to dismiss the indictment prior to trial (R. 614–624) appears at 72 F. Supp. 58; and the opinion denying the claim of immunity in relation to the admissibility of the stenographic transcript of the hearing before the Congressional Committee (R. 23–31) appears at 72 F. Supp. 165.

JURISDICTION

The judgment of the court of appeals was entered March 18, 1948 (R. 656), and a petition for rehearing was denied March 29, 1948 (R. 657). The petition for a writ of certiorari was filed April 27, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether Public Law 601, prescribing the authority of the Committee on Un-American Activities, is unconstitutional.

2. Whether the books and records which petitioners were directed to produce before the Congressional Committee were pertinent to the inquiry.

3. Whether evidence showing that petitioners appeared before the Congressional Committee and refused to produce the books and records was admitted in violation of R. S. § 859, which extends immunity to "testimony given by a witness" in a Congressional hearing.

4. Whether the evidence supports the verdict of the jury that petitioners could have complied with the subpoenas if they had desired to.

STATUTES AND RESOLUTION INVOLVED

Revised Statutes § 102, as amended, 52 Stat. 942, 2 U. S. C. 192, provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Revised Statutes § 859, as amended, 52 Stat. 943, 28 U. S. C. 634, provides:

> No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

House of Representatives Rule XI (q) (2), as amended by Section 121 (b) of the Legislative Reorganization Act of 1946, Pub. L. No. 601, 79th Cong., 2d Sess., 60 Stat. 812, 828 (adopted by the House of Representatives, 80th Congress, H. Res. No. 5, 80th Cong., 1st Sess.), provides:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.
>
> For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to

require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

STATEMENT

Petitioners, members of the Executive Board of the Joint Anti-Fascist Refugee Committee, were convicted in the United States District Court for the District of Columbia on the second count of a two-count indictment for violation of R. S. § 102.[1] Count 2 (R. 5–6) charged that defendants, having been summoned to produce certain records of the Joint Anti-Fascist Refugee Committee before the House Committee on Un-American Activities,[2] appeared before the Committee but failed to produce the records called for as they had power to do and thereby wilfully made default.

---

[1] The trial court directed a judgment of acquittal on the first count, which charged the defendants with conspiracy to defraud the United States and to commit an offense against the United States by depriving a Congressional Committee of records called for in subpoenas issued by the Committee (R. 589).

[2] To avoid confusion in referring to the two committees, we shall refer to the Un-American Activities Committee as the "Congressional Committee" and to the other as "JAFRC."

The facts are not in dispute, for none of the defendants testified at the trial and the defense testimony consisted chiefly of character evidence. The Government's evidence falls into two broad categories—testimony showing the issuance and service of the Congressional Committee's summonses on the defendants and their failure to comply, and testimony showing that in undertaking to investigate the Joint Anti-Fascist Refugee Committee the Congressional Committee had ample basis for believing that JAFRC was engaged in propaganda activities of the kind made subject to investigation by the authorizing resolution. Evidence of the first category was adduced in the presence of the jury and the issue was decided by them. The other evidence was heard by the trial judge, who ruled that the books and records in question were pertinent to the matter under inquiry by the Congressional Committee and that the Committee had a reasonable basis for investigating the Joint Anti-Fascist Refugee Committee (R. 607).

The Government's evidence may be chronologically summarized as follows:

The Joint Anti-Fascist Refugee Committee, an unincorporated association (R. 423), has for its avowed purpose the raising and distribution of funds and other activities for the relief of anti-fascist refugees (see R. 536–537). In practice, its governing officials consist of the Executive Board, of which petitioner Barsky is chairman and the

other petitioners are members, and its Executive Secretary, a Miss Helen R. Bryan (see R. 424–425).

Congressman Wood, then Chairman of the Congressional Committee, testified that when he became a member of the Committee in July 1945, an investigation already had been undertaken into the activities of JAFRC (R. 211). As a result of complaints received, the Congressional Committee inquired of the President's War Relief Control Board concerning JAFRC. That Board, which had authorized JAFRC to collect funds, informed the Congressional Committee that it had learned that JAFRC was "carrying on political propaganda, instead of relief, and using the funds that they were collecting from the public for that purpose" and expressed satisfaction that the Congressional Committee was carrying on an investigation, inasmuch as the Board was unable to conduct one (R. 326–327). The Board supplied the Committee with a letter written to it by a Vermont newspaper publisher, in which it was stated that "It is my sincere belief that the Joint Anti-Fascist Refugee Committee is not an American group but one dominated by a foreign government and serving that government's purpose, and that it has as its main purpose the spreading of doctrines and ideas completely in variance with those for which this war is being fought, and with the principles on which this country was founded" (R. 318–319). Congressman Wood further testi-

789860—48——2

fied (R. 338) that they had learned from the State Department "long before the subpoenas were issued that this organization, Joint Anti-Fascist Refugee Committee, had been making applications for transit visas for people to come through this country en route to Mexico, who, upon their investigation, were found to be outstanding Communists * * *." A book written by petitioner Fast stated that JAFRC had financed the return of Tito (R. 327).[3]

With the foregoing information in its files, the Congresssional Committee on December 1, 1945, addressed a letter to JAFRC requesting permission to make a preliminary investigation of its records (R. 214). JAFRC responded by letter signed by petitioner Barsky on December 5, 1945, stating that the request would be considered by the Executive Board (R. 215). In the meantime, on December 4, the Congressional Committee issued its first subpoena in this matter, directing Helen R. Bryan, Executive Secretary, or petitioner Barsky to appear before the Congressional Committee on December 19, 1945, to testify and to produce records showing the receipt and disbursement of money and correspondence with persons outside the United States (R. 221–222). The subpoena was served on Miss Bryan on December 14, 1945 (R. 222), and on the same day the Executive Board of JAFRC met and

[3] "The Incredible Tito," by Howard Fast, published by Magazine House, 114 East 32d Street, New York 16, N. Y.

by resolution, reciting that JAFRC was not a fit subject for investigation by the Congressional Committee, directed petitioner Barsky and Miss Bryan to advise with counsel and to take any necessary steps to protect its rights (R. 540–542). Miss Bryan appeared before the Congressional Committee on January 24, 1946, in response to the subpoena and petitioner Barsky accompanied her, but was not a witness (R. 227). She did not produce the records called for in the subpoena (R. 223).

In the interval between the issuance of the subpoena and Miss Bryan's appearance, the investigation had continued and information was obtained relating particularly to petitioner Barsky, showing that he was an active Communist leader in the Spanish Civil War (see R. 41–98). On the next day, January 25, 1946, a subpoena was issued directing petitioner Barsky to appear and testify and to produce the records previously called for (R. 223–225). Two days before Barsky was scheduled to appear before the Congressional Committee, the Executive Board of JAFRC met and unanimously directed Barsky not to produce the records called for by the subpoena (R. 542–544). Accordingly, Barsky appeared before the Congressional Committee on February 13, 1946, and testified that he did not have possession or custody of the books and records. However, he stated that the Executive Board, of which he was Chairman, did have

ultimate authority to produce the documents which were the subject of the subpoena (R. 427).

At this juncture of the investigation, Mr. Robert C. Alexander, Assistant Chief of the Visa Division of the Department of State, testified before the Congressional Committee on February 15, 1946 (R. 246–258). He stated that JAFRC "was a Communist organization, at least a Communist front organization" (R. 251), because "it has among its members and influential officers or members, a number of persons that we regard as Communists" (R. 252); and that petitioner Barsky was a known Communist, having been on the Executive Committee of the Communist Party in the United States (R. 247). The Congressional Committee also was informed from the files of the President's War Relief Control Board that the Federal Bureau of Investigation had received reports that JAFRC had engaged in political activities in connection with its fund raising campaign and that speakers using sound trucks in New York City had urged the breaking of diplomatic relations between the United States and Spain "and to have also tied in with their appeal labor controversies then current in the New York City area" (R. 306–307).

It was in this context that the Congressional Committee undertook to require the members of the Executive Board, which petitioner Barsky had testified had ultimate control of the books and records of the organization (R. 427), to make

those documents available. On March 29, 1946, subpoenas were issued for all of the defendants, except Barsky who had already been subpoenaed, and for the JAFRC directing them to produce on April 4, 1946, the organization's books and records relating to the receipt and disbursement of money and correspondence and memoranda of communications with persons in foreign countries, for the period from January 1, 1945, to the date of the issuance of the subpoenas (R. 228–229). Each of the defendants was served with a subpoena (R. 134, 136, 137, 142–143, 146–147, 149, 151, 153, 156–157, 161–162, 167), and the organization was served by leaving a subpoena with Miss Bryan, its Executive Secretary (R. 181).

On April 1, 1946, three days before they were required to appear before the Congressional Committee, several of the defendants consulted with one Benedict Wolf, an attorney, and received from him identical written statements to the effect that they could not produce the books and records because they did not have custody of them. Each defendant appeared before the Congressional Committee on April 4, 1946, and each declined to produce the books and records on the ground that Miss Bryan had custody of them. Miss Bryan refused to produce them on the ground that the Congressional Committee had no right to them (R. 230). (See printed transcript of the testimony of witnesses before the Congressional Committee on

April 4, 1946, Government Exhibit 6, pp. 6, 11, 16, 24, 26, 30, 36, 53–54, 61–62, 66, 96–105.)

The jury convicted all sixteen defendants for having failed to produce the books and records and all except Barsky were sentenced to imprisonment for three months and to pay a fine of $500 (R. 32–37). Barksy was sentenced to imprisonment for six months and to pay a fine of $500 (R. 31–32). The trial court suspended execution of the sentences of five of the defendants and they are not parties in the appellate proceedings (see Pet. 8).

On appeal to the United States Court of Appeals for the District of Columbia, the judgments were affirmed, with one judge dissenting. In an exhaustive opinion the court, speaking through Justice Prettyman, reached conclusions substantially in accord with those earlier announced by the Second Circuit in *United States* v. *Josephson,* 165 F. 2d 82, certiorari denied, February 16, 1948, rehearing denied, March 15, 1948, No. 535, this Term.

ARGUMENT

1. The petition for a writ of certiorari in this case renews the arguments concerning the constitutionality of the resolution establishing the congressional committee which were pressed upon this Court in *Josephson* v. *United States,* No. 535, certiorari denied, March 15, 1948. The denial of certiorari came after those arguments had been

rejected upon full and careful consideration by the Second Circuit. And now they have been examined again by another court which has likewise carefully weighed them and found them wanting.[4] Our views, in agreement with these decisions, are set forth in our brief in opposition in the *Josephson* case, pp. 11–18. For the reasons stated in that brief, as well as for the reasons stated by both courts of appeal, we respectfully submit that the contention is without merit.

2. There can be no serious question that having been authorized to investigate "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries * * *," the congressional committee had ample basis for inquiring into the activities of JAFRC and for demanding production of its records showing receipts and disbursements and communications with persons in foreign countries. As probable cause for its investigation, the congressional committee had in its files information showing that although JAFRC purported to be a relief organization, it was in fact engaged

[4] It may be noted in this respect that on the facts of this case the court below need not have gone any further in its opinion on this issue than the last full paragraph which appears at page 633 of the record. The remaining discussion assumes that questions possibly might have been asked of petitioners which would have demanded disclosure that they are believers in communism or members of the Communist Party. But such questions were not asked, and the case thus does not present that question.

in political propaganda activities. This was attested to by the President's War Relief Control Board. Coupled with this information, the congressional committee had information from a responsible official of the State Department that JAFRC "was a Communist organization" or, at the very least, a "Communist front organization," and that some influential members of JAFRC were known as Communists. And it had other information that petitioner Barsky, Chairman of JAFRC, was an active member of the Communist Party, having been on its Executive Committee. On this information alone—and it was not alone (see *supra,* pp. 6–11)—the congressional committee had a reasonable basis for believing that the propaganda activities in which JAFRC was apparently engaged derived from a foreign source, and that an investigation was therefore warranted. This being so, it obviously was pertinent to the authorized inquiry to start, as the congressional committee did, by seeking to examine those books and records of JAFRC which disclosed the organization's receipts and disbursements and its communications with persons in foreign countries. Both courts below had no difficulty in finding that the congressional committee had sufficient basis for investigating JAFRC and that the subpoenaed books and records were pertinent to the inquiry, and we agree.

3. Revised Statutes § 859 (28 U. S. C. 634) provides that—

> No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

When petitioners appeared before the congressional committee they refused to produce the subpoenaed books and records of JAFRC. The transcript of the proceedings before the congressional committee showing this refusal was adduced in evidence at petitioners' trial (R. 370). Relying on the above quoted statute, petitioners urge that the transcript showing their refusal was improperly received in evidence. Curiously, petitioners do not contend that oral testimony showing their refusal to produce the books and records before the congressional committee is also forbidden by R. S. § 859. Indeed, they urge that the Government could prove its case in this manner, and this view, it appears, is dictated by the fact that a contrary argument would place them in the position of arguing that they obtained immunity from prosecution for contempt of the congressional committee, because the grant of immunity forecloses the courts from receiving any evidence showing what they said before the congressional

committee. In our view, if the immunity statute comes into play, it must necessarily extend not only to the stenographic transcript of the proceedings but as well to any other use of the testimony which was given. See *Nardone* v. *United States*, 308 U. S. 338, 340–341. The immunity which is granted is a matter of substance and the form in which the testimony is used—whether it be a stenographic record or an oral report—is immaterial. Thus the critical question which petitioners present is whether Congress by the immunity provision foreclosed the prosecution of petitioners under R. S. § 102 for defiance of one of its committees.

To state the question is to answer it. The trial judge carefully and exhaustively examined the problem (see R. 23–31) and on the basis of the legislative history of the immunity provision, analogous decisions of this Court stating that an immunity provision does not preclude prosecution for perjury in the course of the proceedings,[5] and the plain purpose of the immunity statute, he held that it "does not bar the use of all testimony taken at a Congressional hearing in a prosecution for contempt or conspiracy leading to contempt" (R. 31). The court of appeals adopted the trial judge's opinion on this question (R. 642–643). In our view, no other construction of the statute is reasonably possible.

---

[5] *Glickstein* v. *United States*, 222 U. S. 139, 143; *Heike* v. *United States*, 227 U. S. 131, 141.

Moreover, we reach the same result by another approach to the question. In our view, petitioners' statements to the congressional committee declining to produce the books and records were not testimony within the meaning of the immunity statute. Obviously, if petitioners had ignored the subpoenas completely and had so informed the congressional committee by letter, R. S. § 859 would in no way have any application to this case. The situation is hardly any different where, as here, petitioners responded to the subpoenas in person for the purpose of declining to produce the books and records which the congressional committee sought. R. S. § 859 seeks to aid congressional investigations by facilitating the disclosure of information. By no stretch of its purpose or its words can it be said to extend to defiance of a congressional committee by a declination to disclose the information sought. It is difficult to believe that a witness who, having been sworn, refuses to testify before a congressional committee could insist that the transcript of the proceeding could not be received at his trial for contempt of Congress on the ground that this was made immune by R. S. § 859. The present case is no different. Only where testimony called for by the inquiry is given does R. S. § 859 come into play. Any other view would pervert the statute completely so as to grant immunity from prosecution for contempt to those who fail to disclose information, notwithstanding that the plain pur-

pose of the statute is to facilitate the securing of information by extending immunity to facts disclosed before a congressional committee. There is no basis in reason for petitioners' argument that notwithstanding that Congress has provided for the criminal punishment of those who defy its authority, it also has foreclosed the courts from receiving the most persuasive evidence of the violation by extending immunity to petitioners' statements declining to comply with the subpoenas and produce the demanded books and records.

4. Petitioners' argument (Pet. 19–20), in effect, that they were strangers to the books and records and were incapable of producing them hardly justifies comment. The record shows that petitioner Barsky, Chairman of JAFRC, had earlier informed the congressional committee that "the Executive Board would have the ultimate authority to produce the records" (R. 427). The correctness of this statement is borne out by what petitioners as members of the Executive Board did. Thus, on December 14, 1945, when the first subpoena was served on Miss Bryan, the Executive Secretary of the organization, the Executive Board met immediately and formally instructed petitioner Barsky and Miss Bryan to consult with counsel, at the same time denying the authority of the congressional committee to investigate JAFRC (R. 540–542). Miss Bryan did not produce the books and records (R. 223). There-

after a subpoena was served on petitioner Barsky, and two days before he was scheduled to appear before the congressional committee, petitioners met again and this time by formal resolution directed Barsky not to produce the records called for by the subpoena (R. 542–544). It was at this juncture that Barsky justified his failure to comply with the subpoena on the ground that he did not have possession of the books and records and that "ultimate authority" was in the Executive Board. Thereafter, when the members of the Executive Board were directed to produce the books and records, they declined to do so on the ground that Miss Bryan had custody of them.

The short of the matter is that petitioners indisputably could have complied with the subpoenas if they had been so inclined. Their failure to produce the books and records on the ground that they were incapable of complying is directly in the teeth of their formal resolution, acting as the Executive Board, directing petitioner Barsky not to furnish them to the Congressional Committee. Their conduct demonstrates an obvious and studied effort to shift legal responsibility for defying the Congressional Committee from themselves to their subordinate, Miss Bryan.

The trial judge instructed the jury that they could not convict unless they found that each "defendant, alone or in concert with one or more of the defendants, had custody or dominion and

control over such records" (R. 610). And in this respect the jury were further instructed that (R. 610):

> * * * it is the law that when two or more persons act in concert or participate in an illegal activity, each is responsible, irrespective of the part he plays in the activity; or if one person aids or abets, advises, or counsels, or encourages another to commit an offense, he is equally liable under the criminal law with the one who physically commits it. * * *[6]

The jury could not reasonably have concluded other than that the Executive Board was fully capable of producing the books and records and that petitioners acting in concert as members of that Board wilfully refused to honor the demand of the Congressional Committee. The soundness of this conclusion is strikingly illustrated by the fact that these same petitioners who purportedly could not produce the books and records for the Congressional Committee had no

---

[6] Since anyone who aids, abets, procures or commands another to commit a crime is liable as a principal (18 U. S. C. 550), it is settled that it is unnecessary that the indictment specifically charge him as an aider and abettor. It is sufficient that the evidence discloses guilt on an aiding and abetting basis and the jury is correctly instructed. That was the situation in *Bozza* v. *United States*, 330 U. S. 160, 164. See *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 192; *Melling* v. *United States*, 25 F. 2d 92, 93 (C. C. A. 7); *Collins* v. *United States*, 20 F. 2d 574, 578 (C. C. A. 8); *Harris* v. *United States*, 273 Fed. 785, 790 (C. C. A. 2), certiorari denied, 257 U. S. 646.

difficulty in offering them, even without a subpoena, at their trial (see R. 233; Pet. 8).[7]

CONCLUSION

In its essential aspects this case is no different from *Josephson* v. *United States, supra.* The reasons which led to the denial of the petition for a writ of certiorari in that case compel the same result here.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

MAY, 1948.

[7] Petitioners suggest (Pet. 18–19) that the wilfulness required by R. S. § 102 is a specific intent, which they say was not shown. It is plain that they knew that they were required to comply with the subpoenas and that pursuant to advice of counsel they intentionally did not place themselves in compliance. This was wilful misconduct within the meaning of the statute. *Fields* v. *United States*, 164 F. 2d 97, 100 (App. D. C.), certiorari denied, 332 U. S. 851. Pure motive, if petitioners had it, does not relieve them from their intentional misconduct. See *Sinclair* v. *United States*, 279 U. S. 263, 299, which involved a prosecution for refusal to answer a pertinent question at a Congressional inquiry.

U. S. GOVERNMENT PRINTING OFFICE: 1948

FILE COPY

FILED
MAY 8 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 766

EDWARD K. BARSKY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA.

MOTION OF CIVIL RIGHTS CONGRESS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF

HARRY SACHER,
Attorney for Civil Rights Congress, Amicus Curiae.

HERMAN ROSENFELD,
of Counsel.

INDEX

	PAGE
MOTION	1
BRIEF	3
The Facts	3
The Issue	4
Argument—The first Amendment Constitutes an Affirmative Limitation Upon Congressional Power and Extends to All the Activities of Congress	4

CASES CITED

Basey v. Dist. of Columbia, 319 U. S. 579	6
Bridges v. California, 314 U. S. 252	6
Gitlow v. New York, 268 U. S. 652, 666	6
Grosgean v. American Press Pub. Co., 297 U. S. 233	6
Hannigan v. Esquire, Inc., 327 U. S. 146, 158	6
Hartzel v. United States, 322 U. S. 680, 687, 688	5
Herndon v. Lowry, 301 U. S. 242	6
Lovell v. City of Griffin, 303 U. S. 444, 452, 453	6, 9
National Broadcasting Co. v. United States, 319 U. S. 190, 226	5
Near v. Minnesota, 283 U. S. 697	7
NLRB v. Armour & Co., 154 Fed. (2d) 570 (10 Cir., 1945)	9

PAGE

NLRB v. Virginia Elec. & Power Co., 314 U. S. 469 6

Palko v. Connecticut, 302 U. S. 319, 327 ..... 1, 7

Schneider v. Irvington, 308 U. S. 147 6

Stromberg v. California, 283 U. S. 359, 369, 370 6

Thornhill v. Alabama, 310 U. S. 88, 97 8

United States v. Ballard, 322 U. S. 78 7

West Va. v. Barnette, 319 U. S. 624, 638 ..... 6, 9

Winters v. New York, ... U. S. ....., 68 S. Ct. 665 ..... 6, 7, 8

MISCELLANEOUS

1947 Columbia Law Review, 46 8

H. R. 5, 79th Congress, 1st Session 3

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No.

EDWARD K. BARSKY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA.

MOTION OF CIVIL RIGHTS CONGRESS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

This case presents important questions affecting the breadth of the protection afforded by the First Amendment. Upon their determination may very well depend the preservation of the guaranties of speech from alternation by ingenious maneuvers designed to circumvent the protective principles which this Court has declared guard the liberties embodied in the First Amendment.

The Civil Rights Congress, dedicated as it is to the maintenance of these basic freedoms, "the matrix, the indispensable condition of nearly every other form of freedom",[1] seeks to appear here as amicus curiae so that

[1] *Palko* v. *Connecticut*, 302 U. S. 319, 327.

it may call attention to the broad implications of the majority opinion below and to its adverse influence upon the course of civil liberties in this country. It adopts and supports the petitioner's position with respect to the issues raised, but in this, its brief in support of the petition for a writ of certiorari to the Court of Appeals for the District of Columbia, it will discuss only the serious constitutional questions affecting the First Amendment raised by the record. Permission to file this brief has been obtained from the petitioners, and has been sought from the government, although no response has been received. The Civil Rights Congress, therefore, respectfully moves that it be permitted to file the attached brief as *amicus curiae*.

BRIEF

THE FACTS

The salient facts are not, apparently, the subject of any real controversy. The petitioners were members of the executive committee of a voluntary unincorporated association, The Joint Anti-Fascist Refugee Committee. The aims of the Committee are non-political—to solicit funds to be disbursed for relief purposes in other countries.

The House Committee on Un-American Activities issued to the petitioners alleged subpoenas duces tecum calling for the production of the Committee's records "relating to the receipt and disbursement of certain money and certain correspondence with persons in foreign countries". The petitioners failed to produce the documents sought, although each of them appeared before the Committee.

The basic, although not the only, contention taken by the petitioners with respect to the validity of the subpoenas served upon them is, to quote the majority opinion below, "that the Resolution creating the Congressional Committee was unconstitutional because it authorized inquiry into political opinion and expression in violation of the First Amendment". This contention is based upon the language of the resolution [2] which creates a standing committee of Congress authorized "to make from time to time investigations of (i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto what would aid Congress in any necessary remedial legislation".

[2] H. R. 5, 79th Cong., 1st Sess.

In sum, the petitioners resist the process issued by the Committee on the ground that the Congressional mandate exceeded the Constitutional limitations upon legislative power and did not, therefore, confer any authority upon the Committee. No general challenge is offered to the power of inquiry in aid of legislation; it is urged, however, that this power is circumscribed by the First Amendment to the same extent as are other powers of the Congress.

THE ISSUE

Can the Congress empower one of its Committees to inquire into matters concerning which its power to legislate is limited by the First Amendment and can such a Committee compel testimony in the face of the provisions of the First Amendment?

ARGUMENT

The First Amendment Constitutes an Affirmative Limitation Upon Congressional Power and Extends to All the Activities of Congress

The majority of the Court below supports its affirmance of the judgment of conviction by resort to the thesis that the power to inquire need not, in its exercise, guaranty that invalid legislation will not be adopted as a result. "Obviously, the possibility that invalid as well as valid legislation might ensue from an inquiry does not limit the power of inquiry." Rather, it is suggested that Congress is charged with the Constitutional duty, as a part of government, "to inquire into potential threats to itself, not alone for the selfish reason of self protection, but for the basic reason that having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation to its creators to preserve itself. Moreover, the process whereby a change in the form of government can be accomplished has been prescribed by

the people in the same document which records the establishment of the presently existing machinery, and that process requires the Congress to initiate proposed amendments. We think that inquiry into threats to the existing form of government by extra-constitutional processes of change is a power of Congress under its prime obligation to protect for the people that machinery of which it is a part, and inquiry into the desirability *vel non* of other forms of government is a power of Congress under its mandate to initiate amendments if such become advisable."

The power of legislative inquiry as thus defined has virtually no limits. If, as the opinion declares, Congress can examine into matters on which it cannot legislate, but concerning which Constitutional amendments may be adopted, it is obvious that the only boundary to such an investigation is Congressional ingenuity in projecting constitutional change. On this theory, Congress could inquire into any field of activity, no matter how remote from normal federal influence and to that end call to its aid compulsory process. Even matters reserved to state action would not be immune to Congressional scrutiny. Committee subpoenas could be directed at state officials; the operation of state agencies could be examined; even such purely local matters as the relationship between the state and municipal governments could be made the object of Congressional investigations on the theory that a Constitutional amendment might bring such matters within the ambit of federal regulation.

The notion that a Congressional Committee may, in practical terms, abridge the enjoyment of free speech because Congress might conceivably introduce an amendment curtailing the protections of the First Amendment opens a convenient avenue of attack upon the amendment. What Congress cannot do by way of statute;[3] what the executive arm may not do by way of executive

[3] *Hartzel* v. *United States*, 322 U. S. 680, 687, 688; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 226.

power or administrative regulation;[4] what a court may not do by its construction and application of the laws,[5] is apparently left open to Congress through its power to inquire.

The First Amendment contains no exceptions. It applies to all branches of the federal government and to all phases of its power.[6] And the Fourteenth Amendment extends its provisions to state activity, in all its forms, as well.[7] In the face of repeated attempts, this court has uniformly resisted any suggestion that the First Amendment is apposite only within limited areas. It is available to protect the right of a person to criticize the courts;[8] it is a barrier to criminal prosecutions for opinion;[9] it limits the tax power of the states;[10] and even of the federal government;[11] it controls the activities of federal administrative agencies;[12] it sets bounds to the regulation by municipalities of the use of streets and other public places.[13] It would be an anomaly in-

---

[4] *Hannigan* v. *Esquire, Inc.*, 327 U. S. 146, 158.

[5] *Herndon* v. *Lowry*, 301 U. S. 242; *Winters* v. *New York*, ... U. S. ....., 68 S. Ct. 665.

[6] *West Va.* v. *Barnette*, 319 U. S. 624, 638. "The very purpose of a Bill of Rights was to withdraw certain subjects from the necessitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

[7] *Gitlow* v. *New York*, 268 U. S. 652, 666.

[8] *Bridges* v. *California*, 314 U. S. 252.

[9] *Stromberg* v. *California*, 283 U. S. 359, 369, 370; *West Va.* v. *Barnette*, 319 U. S. 625.

[10] *Grosgean* v. *American Press Pub. Co.*, 297 U. S. 233; *Lovell* v. *City of Griffin*, 304 U. S. 444.

[11] *Basey* v. *Dist. of Columbia*, 319 U. S. 579.

[12] *NLRB* v. *Virginia Elec. & Power Co.*, 314 U. S. 469.

[13] *Schneider* v. *Irvington*, 308 U. S. 147.

deed if a Congressional investigating committee alone is free from the need to observe its dictate.

Argument is hardly needed to establish that any statute framed in the language of the mandate under which the Un-American Activities Committee presumes to function could not withstand challenge. House Resolution No. 5 which creates it speaks expressly and repeatedly of "Un-American propaganda", and of its "diffusion" within the United States. Its objectives are ideas which the Committee feels are undesirable; the exchange of opinions and the dissemination of thought which the Committee thinks dangerous. It is precisely such censorship of opinion which the First Amendment was designed to prevent.[14] When opinion can be made the gravamen of a crime, or the occasion for the imposition of any form of sanction, then free speech no longer exists.[15] When any man or group of men are at liberty to judge of the merits of an idea and to set in train punishment for those whose ideas repel them, then the First Amendment will lose its meaning.[16]

The majority opinion suggests, however, that the mere scope of House Resolution 5 in the light of the possibility that the Committee might set limits upon its own inquiry which are consonant with constitutional safeguards, does not justify disobedience to it. Aside from the fact that the Committee is notoriously disinclined to fix such boundaries to its activities and has, on the contrary,

---

[14] *Near* v. *Minnesota,* 283 U. S. 697; *Winters* v. *New York,* supra.

[15] *Palko* v. *Connecticut,* supra. "So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overriden by the courts." Ibid, 327.

[16] *United States* v. *Ballard,* 322 U. S. 78.

utilized its power in the most extreme fashion,[17] this view does not meet the objection to the propriety of the resolution. The mandate must be tested not in terms of the possibility that it may be so narrowly construed that no invasion of personal liberty will result, but in the light of the power it purports to invest. This is particularly true since the judicial construction imposed upon it, in no way remedies its obvious defects.[18] Dealing with a state statute, the enforcement of which was defended by the assertion that the defendant's specific conduct could have been regarded as criminal, this court declared:

> "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship. An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. * * * Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill* v. *Alabama,* 310 U. S. 88, 97.

Similarly, a licensing statute was denied enforcement because it granted uncontrolled discretion to the licensor, even though the defendant there had made no application

---

[17] '47 Columbia Law Review, 46.

[18] *Winters* v. *New York,* supra, 68 S. Ct. at 669.

for a license and therefore could not claim an abuse of discretion.

> "As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her." *Lovell* v. *City of Griffin*, 303 U. S. 444, 452, 453.

It is urged, however, that the Committee's conduct cannot constitute an abridgement of speech in a justiciable sense since no direct liability is imposed upon a witness, no matter what his answer. It is conceded that "embarrassment and damage" could flow, but this, it is said, is the result of "the current unpopularity of the revealed belief and activity." [19]

The court below, in brief, does not recognize the right to remain silent; it hedges the guarantee of free speech with the requirement of open declaration of opinion under compulsion, no matter what the consequences.[20] And yet a rational evaluation of human experience cannot but appreciate the importance of the right to privacy of opinion. There are many occasions when a refusal to speak cannot be defended by resort to the privilege against seif-incrimination, but where serious and immediate injury to the speaker is threatened. Thus an employee in the process of organizing a union would be foolhardy to divulge his purpose to his employer even though no unlawfulness can be imputed to his conduct. Federal statutes take cognizance of this reality and protect the employee's right to privacy.[21]

Here, too, as the majority appreciates, a witness exposes himself to the most direct and painful reprisal when he

---

[19] Opinion, R. ——.

[20] Cf.: *West Virginia* v. *Barnette*, supra.

[21] *NLRB* v. *Armour & Co.*, 154 Fed. (2d) 570 (10 Cir., 1945).

testifies before the Committee.[22] Men have lost their employment because they have encountered its disfavor. The dilemma is insoluble. It is not a crime to entertain the political and social views which the Committee has made the main object of the inquiry. Thus, the witness cannot claim privilege. Should he be compelled to speak, however, his economic status suffers.

It is idle to say that where Congress asserts the power to force men and women into this position; where it offers them the choice between social sanctions and criminal penalties, it does not impose a restraint upon speech. This contradiction cannot be reconciled with the right to free enjoyment of opinion which the First Amendment protects. An issue so fundamental to our democratic institutions is one upon which this Court should pass.

Respectfully submitted,

HARRY SACHER,
Attorney for Civil Rights Congress,
Amicus Curiae.

HERMAN ROSENFELD,
of Counsel.

---

[22] The dissenting opinion, by Edgerton, J., describes the burden imposed upon freedom of speech thus: "The investigation restricts the freedom of speech by uncovering and advertising expressions of unpopular views. The Committee gives wide publicity to its proceedings. This exposes the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment. Persons disposed to express unpopular views privately or to a selected group are often not disposed to risk the consequences to themselves and their families that publication may entail. The Committee's practice of discovering and advertising unpopular views is therefore a strong deterrent to any expression, however private, of such views." (R. .....)

FILE COPY

Office - Supreme Court,
FILED
MAY 26 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 766.

EDWARD K. BARSKY, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF.

ROBERT W. KENNY,
BARTLEY C. CRUM,
CHARLES HOUSTON,
CHARLES KATZ,
BEN MARGOLIS,
MARTIN POPPER,
SAMUEL ROSENWEIN,
Attorneys for amici
John Howard Lawson,
Dalton Trumbo,
Albert Maltz,
Alvah Bessie,
Samuel Ornitz,
Herbert Joseph Biberman,
Edward Dmytryk,
Adrian Scott,
Ring Lardner, Jr.,
Lester Cole.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 766.

EDWARD K. BARSKY, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

This application for leave to file a brief as amici curiae in the above entitled proceeding is made on behalf of the following persons, John Howard Lawson, Dalton Trumbo, Albert Maltz, Alvah Bessie, Samuel Ornitz, Herbert Joseph Biberman, Edward Dmytryk, Adrian Scott, Ring Lardner, Jr., and Lester Cole. These men are prominent writers and directors of the motion picture industry in Hollywood. In October, 1947, they appeared before the House Committee on Un-American Activities in response to subpoenas served upon them. They were sworn and testified. Except for some routine preliminary questions (name, address, occupation), the only two inquiries addressed to

these persons were, first, whether they were members of a specified trade union, and second, whether they were, or had ever been, members of a specified political party. The witnesses asserted that the Committee was without constitutional authority to compel the disclosure under oath of a person's trade union and political affiliations because the inquiries invaded the area of conscience and belief. Despite such assertions these persons have been cited by the House of Representatives for contempt of the Committee and indictments charging refusal to answer the questions concerning trade union and political affiliation.

The Committee on Un-American Activities, once a special committee of the House of Representatives, and now a standing committee with permanent pervasive influence, has been empowered by law, at least according to the Committee's interpretation and application of the law, to "investigate," with the aid of compulsory process, every idea of social, economic and political change, and every person and organization in America who espouse such ideas. The Committee has construed their power as extending to "any activities of any organization or any individual". *Hearings on Communists 1945, p. 31; Hearings of Committee, Vol. 4, p. 2996.* Such an inquisition has heretofore been unknown to our Constitution. Indeed, it has often been stated that the Bill of Rights was included in our fundamental law to make certain that the inquisition of the Middle Ages, the Star Chamber and the Salem witchcraft hysteria would never appear on the American scene. (See, *Elliot's Debates on the Federal Constitution* (Phil., 1836), 2d. Ed., Vol. III, p. 447; *West Virginia State Board of Education* v. *Barrette,* 319 U. S. 624, 636 (1943).)

We do not believe that this Court, the supreme interpreters of the Constitution, will permit such a governmental inquisition to endure. On behalf of all citizens and artists who value intellectual freedom, we urge the Court to grant the application of the petitioners in the above entitled pro-

ceeding so that one of the most momentous issues ever to come before the Court may be fully presented and argued.

We ask leave to file the annexed brief in support of petitioners' application for a writ of certiorari. We have filed with the Clerk of this Court the written consent of the counsel for petitioners and respondent.

The brief touches only upon a few salient features which mark the importance of this proceeding. Words alone, however, cannot portray the grave danger which the Committee represents to our free institutions. Judge Edgerton in the Court below rightfully stated: "The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak."

It is imperative, we respectfully submit, that the validity of the Committee on Un-American Activities be adjudicated by this Court. The fate of our democratic institutions rests to a large extent upon that determination.

BRIEF OF AMICI CURIAE.

ARGUMENT.

I.

The Committee in Operation and Effect Abridges Freedom of Opinion and Belief.

We desire to give this Court a single example of how the Committee construes and applies its powers in action. We wish to show the Court how this Committee construes its statutory authority. We emphasize that this is only one glimpse behind the curtain. The complete picture must await the full argument before this Court.

On October 20, 21, 22, 23, 24, 27, 28, 29, and 30, 1947, the House Committee on Un-American Activities conducted an inquiry into the motion picture industry (*Hearings before the Committee, Hearings regarding the Communist Infiltration of the motion picture industry*—hereinafter referred to as Hearings). In the first week of the hearings, there appeared before the Committee many of the leading producers in the industry. There was one line of questions assiduously pursued by every member of the Committee present and its chief investigator.

> "Mr. Vail. I would like to get one or two specific answers from Mr. Warner.
>
> Touching again upon the association, you are a very responsible executive in the motion-picture industry, Mr. Warner. You are thrown into an association, in this organization, with other executives of the industry.
>
> Now, we have touched upon the writers that were dismissed. But we all have knowledge of a large number of actors who are generally known to have communistic sympathies and are contributors to the Communist war chest. It would seem to me that your organization would recognize the fact that the American people are not interested in viewing the pictures in which actors appear who have communistic leanings. It would seem to me that this organization should concern itself with cleaning house in its own industry.
>
> You pointed out what the organization was not organized for, but you didn't touch upon the reason, the actual reason or reasons, for its existence. I take it for granted that the reason is the betterment and the improvement of the industry. I don't think that you can improve the industry to any greater degree and in any better direction than through the elimination of the writers and the actors to whom definite communistic leanings can be traced.
>
> Don't you agree to that, Mr. Warner?"
>
> *Hearings*, pp. 52, 53.

The chief investigator put it this way:

> "Mr. Stripling. Don't you think the most effective way of removing these Communist influences—and I

say Communist influences; I am not saying Communists; I am not accusing them all of being Communists—but don't you think the most effective way is the payroll route? In other words, if the owners and producers cut these people off the payroll it would eliminate it much quicker than a congressional committee or crusades and so forth."

Hearings, pp. 49, 50.

Here is another view:

"Mr. Nixon. Getting down to specific cases as to what the industry should do—

Mr. Menjou. Yes, sir.

Mr. Nixon. To rid itself of un-American activities in Hollywood if, for example, a producer were to be given unequivocal proof that one of his star actors was a member of the Communist Party do you believe that that producer has the responsibility as an American not to renew that person's contract?"

Hearings, p. 105.

Here are the last words of the Chairman of the Committee as the hearings closed ("the committee is not adjourning *sine die*"):

"It is not necessary for the Chair to emphasize the harm which the motion-picture industry suffers from the presence within its ranks of known Communists who do not have the best interests of the United States at heart. The industry should set about immediately to clean its own house and not wait for public opinion to force it to do so."

Hearings, p. 522.

In order that there should be no doubt about the exact meaning of these last words spoken by the Chairman, Mr. Thomas insisted upon being even more precise in the course of a deposition which was taken during the trial of Dalton Trumbo, one of the ten Hollywood writers and directors.

The following are the questions on this subject put to Mr. Thomas and his answers:

> "Q. Did you ever call upon the Hollywood motion picture producers to clean out their house?
> A. Yes; many times, just as I would call upon any other industry that had Communists in it, to clean their house.
> Q. By that you mean, sir, to have them discharged from their jobs?
> A. Exactly."

A mere reading of the few examples cited above, taken from the official transcript of the Hollywood hearings, will assist the Court in understanding that a committee which is so unrestrained in its attempts to impose sanctions to effectuate the abridgement of opinions, beliefs and ideas would consider itself unlimited in defining the ideas which it seeks to abridge. For instance, the following are but a few examples of ideas and beliefs which the Committee has considered as "un-American propaganda activities" and as "subversive and un-American propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution":

(1) To oppose monopolies (Report No. 592, June 16, 1947, p. 12);

(2) To attack "the Standard Oil Company of New Jersey and other responsible industrial organizations" (Report No. 2233, June 7, 1946, p. 35);

(3) To "viciously attack cartels" (Report No. 2233, June 7, 1946, p. 35);

(4) To say that landlords have high powered lawyers while tenants do not (Report No. 2233, June 7, 1946, p. 11; hearings on O. P. A., p. 80);

(5) To sign an open letter on behalf of Harry Bridges, (Report No. 1311, 78th Congress, 2nd Session, March 29, 1944, Report on P. A. C., p. 82);

(6) To have been the "brains" of the C. I. O. and to aid in its formation (Report No. 1311, March 29, 1944, p. 73).

The Hollywood hearings were conducted in the presence of a large audience, almost half of whom consisted of representatives of the press from all parts of the country, with all radio broadcasting systems present, and with lights specially adjusted for television facilities. Here indeed was a gigantic demonstration of the Committee's "exposure" technique aimed at character assassination and depriving persons of the opportunity to follow their calling and of the means to earn a livelihood.

The ten directors and writers here who appeared before the Committee from October 27 to October 30, 1947, became unemployed in the motion picture industry one month later (N. Y. Times, November 26, 1947, 1:2). The motion picture industry thus reversed its policy of non-discrimination because of political belief or association which it had adopted before the Committee hearings began. (Hearings, pp. 312-313). Those who were employed were discharged or suspended from their employment despite written agreements. By publicly announced policy, the motion picture producers have informed the world that nothing further is available to any of the ten in Hollywood.

II.

Under the Constitution, Belief and the Formulation of Belief Are Absolutely Free. The "Clear and Present Danger" Doctrine Is Not a Limitation Upon the First Amendment.

The importance of the issue raised on the present application to this Court is marked by a most profound consideration. The First Amendment, keystone of the Constitution, is in danger. This Court, it is respectfully submitted, has the constitutional duty to avoid that danger.

We assert that the First Amendment to the Constitution of the United States provides for all Americans, of all

faiths, of all races, and of all persuasion, the absolute right to think freely, that discussion of ideas, opinions and beliefs is unlimited. We point in support of our thesis, if proof be needed, to Magna Carta and the Petition of Rights; to John Milton and the "Areopagetica"; to Junius's celebrated letter to the King; to Wilkes, editor of the "North Briton" and the memorable issue number "45"; to Thomas Paine and "The Rights of Man"; to the Declaration of Independence; to the state ratifying conventions of 1787-1789; to Jefferson and Madison and the Kentucky and Virginia Resolutions of 1798; to Mill and the essay "On Liberty"; to Lincoln and the first inaugural address; to Brandeis; to Holmes; to Hughes; and to the myriad plain men and women of America, from Bunker Hill to Bastogne who laid down their lives "in freedom's cause."

Our present concern is not with the true meaning of the First Amendment. It is rather with the attempts now being made to carve out "exceptions" from that charter of liberty for the purported purpose, among others, of "preserving the government." Just as in the days of John Adams and the Federalists, we are now told that "this existing machinery of government has power to inquire into potential threats to itself, not alone for the selfish reason of self-protection, but for the basic reason that having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation to its creators to preserve itself." Thus, the ancient practice of identifying despotic kings with the Divinity is replaced by the philosophical notion that officials of government are the same as the people, and no dissent may be tolerated lest the people, and officials of government, be endangered. This is a curious and dangerous blurring of historical truth. James Madison had a different view:

> "In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroach-

ments are regarded as possible from one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws."

Report on the Virginia Resolution (1800)
In *Elliot's Debates on the Federal Constitution* (Phil., 1836), 2d Ed. Vol. IV, p. 569.

Another device for circumventing the provisions of the First Amendment is to use the "clear and present danger" rule as a means of punishing speech and opinion—as if that "rule of reason" had completely replaced by judicial fiat the provisions of the First Amendment. Thus, the Court below, treating the rule as equivalent to the First Amendment, sweeps it aside as inapplicable to governmental action involving compulsory disclosure of beliefs and associations, and permits the infringement of these freedoms "when danger is reasonably represented as potential." Even those who punished "seditious libel" and "constructive treason" left more freedom for their victims.

Moreover, we deal here with a statutory enactment, Public Law No. 601. This, the Court below appears to have overlooked, treating the inquiry as something different from legislative measures. In this area of legislative enactments which restrict speech there is a developing attitude in the Courts to stretch the "clear and present danger" rule to a point where the "bad tendency" rule of the 1920's is reached. This is another variation of the attempt to circumvent and supersede the provisions of the First Amendment.

The "clear and present danger" doctrine was enunciated by Mr. Justice Holmes for this Court in *Schenck* v. *United States,* 249 U. S. 47 (1919). We do not believe that the promulgation of this rule by Mr. Justice Holmes was ever intended to replace, or limit, the broad scope of the First Amendment. Certainly, his numerous dissenting opinions

together with those of Mr. Justice Brandeis which followed soon after the decision in the Schenck case, indicated that he had no such purpose.

We believe that the "clear and present danger" test is a rule which can be applied only in the realm of conduct. Thought and expression of thought are free—absolutely free. Only in the domain of conduct may governmental power impinge, and then only if the circumstances are such as to create a clear, serious, and imminent danger that the conduct will directly and intentionally bring about the substantive evil that Congress has a right to prevent. It is a question of proximity and degree of unlawful conduct—a question to be decided by fixed principle of the criminal law (See, Holmes, *The Common Law* (1881), pp. 54, 68), and not by the unfettered judgment of officials of government or the legislature.

III.

The Committee Has Consistently Functioned in Such a Manner as to Deny Witnesses Before It Due Process of Law as Guaranteed by the Fifth Amendment to the Constitution.

A review of the Committee's actions will reveal that since its inception it has utilized its powers to attempt to impose, and to actually impose, sanctions upon persons appearing before it. Not only has the Committee openly asserted that its purposes are to "expose" and through "exposure" to destroy the reputations and ability to function publicly of organizations and persons, but it has directly sought to secure the discharge and blacklisting of individuals. An example of the latter aim has been cited above. As for destruction through "exposure," one example of "credit" claimed by the Committee relates to what it calls the "People's Front":

> "It is the way of exposure—a way which conforms to the letter and the spirit of a democracy, and is at the same time more effective than a Gestapo.

> In like manner, the committee had a large part in breaking up the People's Front. This was more difficult than the breaking up of the Nazi Front. The People's Front was composed of several million adherents and scores of organizations which bore high-sounding names. The People's Front exercised real political influence." (Report No. 1, 77th Congress, 1st Session, January 3, 1941, pp. 21, 23, 24).

The extent of the Committee's activities as a "democratic" substitute for the Gestapo is indicated by the following:

> "In 1938, only two file cabinets were required to hold the files of this committee, whereas today the committee's files and records on subversive activities fill 135 file cabinets. The index to these files contains over 1,000,000 cards, each containing information in indivduals and organizations engaged in subversive activities." (Report No. 2748, 77th Congress, 2nd Session, January 2, 1943, pp. 2, 3).

That the Committee has thus sought to impose sanctions upon individuals and groups upon a scale unprecedented in American history is not subject to doubt.

These facts, complete documentation of which the undersigned are prepared to submit to the Court if the writ herein is granted, raise most serious constitution questions. The Committee by holding hearings with the purpose and effect of imposing sanctions is performing a judicial function, thereby violating the separating of powers doctrine, (*Kilbourne* v. *Thompson,* 103 U. S., 168; *O'Donghue* v. *United States,* 289 U. S. 56; *Humphreys Executors* v. *United States,* 295 U. S. 602), and denying due process of law to the individuals and organizations damaged by the arbitrary action of the Committee. *Kilbourne* v. *Thompson,* 103, U. S. 168, 182; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370; *State* v. *Louisville & Nashville Ry. Co.,* 323 U. S. 192.

> ". . . the reach of the Amendment is shown to be co-extensive with any exercise by a state of power, in *what-*

> *ever form exerted.* . . . It presupposes the possibility of an abuse by a state official or representative of the powers possessed, and deals with such a contingency. It provides, therefore, for a case where one who in possession of state power *uses that power to the doing of the wrongs* which the Amendment forbids, even though the commission of the wrong may not be within the powers possessed, *if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrong doer.*" *Home Telephone & Telegraph Co.* v. *City of Los Angeles* (1913) 227 U. S. 278, 57 L. ed. 510, 515; emphasis added.

As to the individual or organization affected by the Committee's conduct, its action may be said to constitute a bill of attainder. *U. S.* v. *Lovett,* 328 U. S. 303.

Furthermore, the Committee denies to individuals the most fundamental requirements of procedural due process. It presents no charges, does not provide for confrontation of witnesses, does not permit cross-examination, denies the right of counsel and it takes action and issues its reports upon the basis of rumor, gossip, conclusions and the wildest kind of prejudiced evidence. Never in the history of this country has there been such a wholesale violation of all the basic concepts of due process, which must be afforded even in legislative inquiries which may directly affect the rights of individuals or organizations. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210; *Londoner* v. *Denver,* 210 U. S. 373; *Morgan* v. *U. S.,* 298 U. S. 468; *Morgan* v. *U. S.,* 304 U. S. 1.

The power of the Un-American Activities Committee to inflict penalties upon those whose ideas and activities fail to conform to its standards, and determination of the rights of individuals and organizations whose very life and existence are threatened by this Committee, present constitutional questions which go to the very root of our democratic processes.

CONCLUSION.

The issues raised in this application are of grave importance. We have touched only upon a few of the many involved herein. We urge the Court to grant petitioners' application, for the havoc wrought by lawless disregard of constitutional requirements cannot always be undone.

Respectfully submitted,

ROBERT W. KENNY,
BARTLEY C. CRUM,
CHARLES HOUSTON,
CHARLES KATZ,
BEN MARGOLIS,
MARTIN POPPER,
SAMUEL ROSENWEIN,
Attorneys for amici

John Howard Lawson,
Dalton Trumbo,
Albert Maltz,
Alvah Bessie,
Samuel Ornitz,
Herbert Joseph Biberman,
Edward Dmytryk,
Adrian Scott,
Ring Lardner, Jr.,
Lester Cole.

FILE COPY

Office - Supreme Court
FILED
MAY 29 1948
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1947

EDWARD K. BARSKY, ET AL.,
Petitioners,
against
UNITED STATES OF AMERICA.

No. 766.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.
OSMOND K. FRAENKEL,
Counsel.

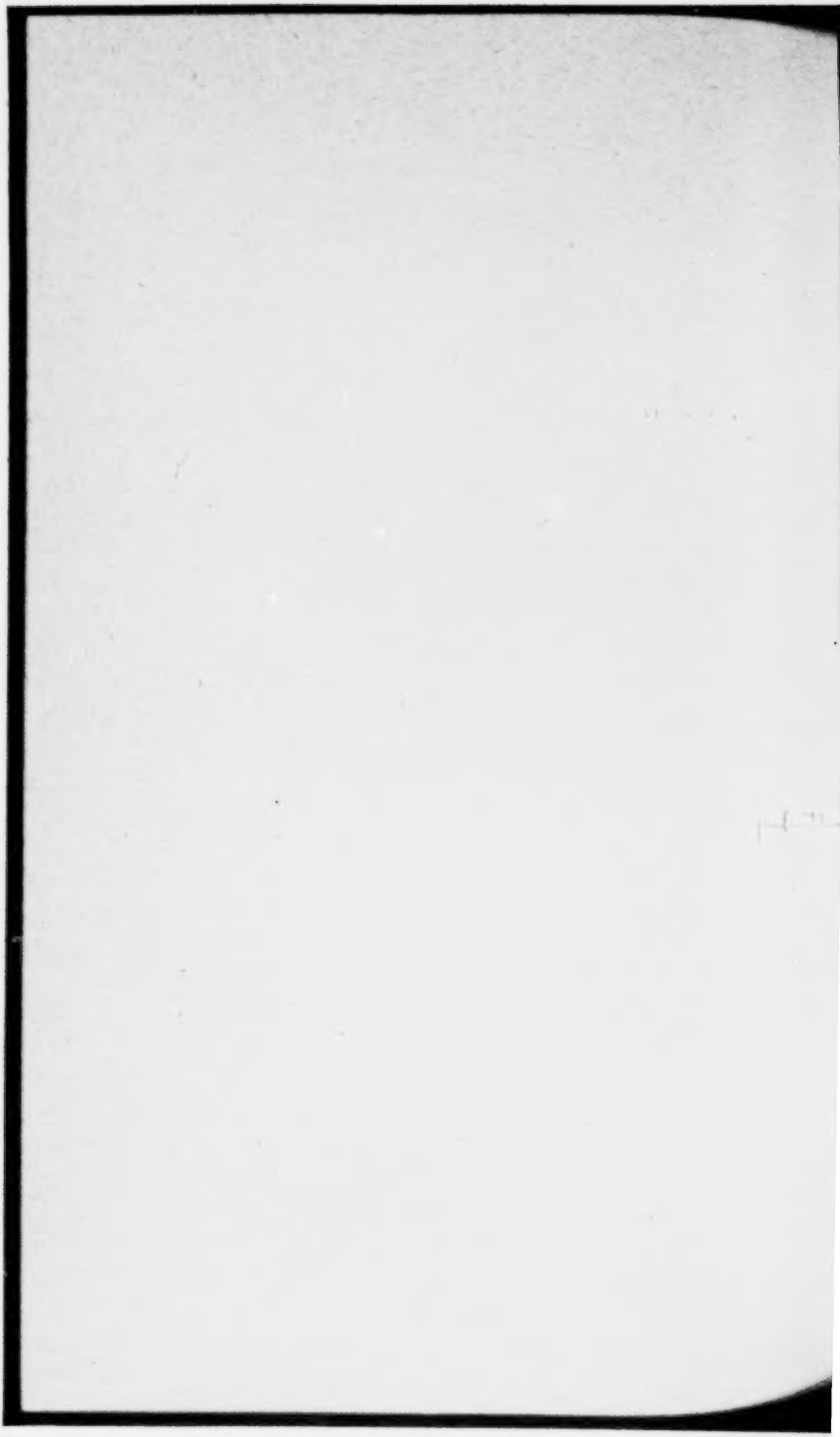
DEVEREUX MCCLATCHEY,
Of the Georgia bar,

FRANCIS GOODALE,
Of the Massachusetts bar,

EMANUEL GORDON,
ARTHUR GARFIELD HAYS,
Of the New York bar,
Of Counsel.

Benjamin H. Kizer
Perley J. Stearns

17



INDEX

PAGE

STATEMENT 1

CONCLUSION 10

Table of Cases Cited

Ballard *v.* United States, 322 U. S. 78 7

Barry *v.* United States ex rel. Cunningham, 279 U. S. 597, 614 3

Baumgartner *v.* United States, 322 U. S. 665 6

Colonial Sugar Refining Company *v.* Attorney General, 15 C.L.R. 182 7

DeJonge *v.* Oregon, 299 U. S. 353 6

Herndon *v.* Lowry, 301 U. S. 442 6

Illinois ex rel. McCollum *v.* Board of Education, 333 U. S. 203 5-6

Interstate Commerce Commission *v.* Goodrich Transit Company, 224 U. S. 194, at 211 4

Jurney *v.* MacCracken, 294 U. S. 195 3

Kilbourn *v.* Thompson, 103 U. S. 168 3

McGrain *v.* Daugherty, 273 U. S. 135 3

Murdock *v.* Pennsylvania, 319 U. S. 105 5

Musser *v.* Utah, 333 U. S. 95 8

Reed *v.* County Commissioners of Delaware County, 277 U. S. 376, 388 3

PAGE

Schneiderman *v.* United States, 320 U. S. 118 6
Shelley *v.* Kraemer, decided May 3, 1948 3
State *v.* Diamond, 27 New Mexico 477 9
State *v.* Klapprott, 127 N. J. Law 395 9
Stromberg *v.* California, 283 U. S. 359 6

Taylor *v.* Mississippi, 319 U. S. 583 9
Thomas *v.* Collins, 323 U. S. 516 5
Thornhill *v.* Alabama, 310 U. S. 88, 97, 98 6

West Virginia State Board of Education *v.* Barnett, 319 U. S. 624 7
Winters *v.* New York, decided March 29, 1948 ..... 6, 8, 9

Statutes, Commentaries, Etc., Cited

Legislative Reorganization Act of 1946, Rule XI(q)i 2

United States Code, Title 2, Section 192 2

United States Constitution:
First Amendment 2, 3, 7, 9
Fifth Amendment 2, 3, 8, 9

House Resolution No. 282, 75th Congress, 83 Congressional Record 7568 2

May, "Constitutional History of England," vol. 2, pp. 38-41 8

Ogden, "The Dies Committee" 7

47 Columbia Law Review 416 7

60 Harvard Law Review 1193 7

Supreme Court of the United States

OCTOBER TERM, 1947

EDWARD K. BARSKY, *et al.*,
Petitioners,
against
UNITED STATES OF AMERICA.

No. 766.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*

The American Civil Liberties Union is a non-partisan, nationwide organization whose members, though of different political beliefs, are united in a devotion to the principles of the Bill of Rights. The Union engages in no political campaigns and has no political credo save that found in the Constitution. It has no affiliation of any kind, formal or otherwise, with the organization which petitioners here are charged with membership in.

This brief is submitted in support of the petition for certiorari with the consent of the parties. The American Civil Liberties Union is interested in this case because it believes that it presents far-reaching problems of the powers of congressional committees in the field of freedom of speech and of assembly, matters which have for many years been among the prime concerns of the American Civil Liberties Union.

The facts are adequately stated in the petition for certiorari and need not be repeated here, except to state that the issue arises on conviction under Section 192 of Title 2 of the United States Code for refusing to produce subpoenaed records before a committee of Congress. With many of the points raised in the petition we are not concerned. We are interested only in the basic question of the validity of the resolution which established the committee in question under the First and Fifth Amendments to the Constitution.

The committee in question, then the Special Committee on Un-American Activities of the House of Representatives, was originally established by House Resolution No. 282 of the 75th Congress, 83 Congressional Record 7568. It was reenacted without change at succeeding sessions of the Congress and embodied substantially without change in the Legislative Reorganization Act of 1946 which for the first time established the committee as a Standing Committee of the House, being Rule XI(q)i.

The purposes of these various committees are:

> "To make from time to time investigations of (1) the extent, character and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of domestic origin and attacks the principle of the form of government as guaranteed by our Constitution."

Petitioners having been summoned to appear before the Committee and produce certain records did appear and answer questions but refused to produce the records. They have contended that the creation of the Committee constituted an abridgement of freedom of speech and of assembly

as guaranteed by the First Amendment and violated the due process clause of the Fifth Amendment because of the vagueness of the terms of reference. This vagueness of the terms of reference affects also the argument under the First Amendment.

In the Court of Appeals for the District of Columbia the convictions were upheld, Judge Edgerton dissenting. We believe that his dissenting opinion forcefully develops the constitutional arguments on behalf of petitioners and that the opinion of the majority fails to meet the arguments advanced in that dissent. There are, however, certain further observations which we think pertinent and which may be helpful to this Court in its consideration of the problem.

1. It is, of course, clear that no arm of government is immune from restraints imposed by the Constitution. This Court has but recently affirmed this principle so far as the judiciary is concerned. See *Shelley* v. *Kraemer,* decided May 3, 1948. That the power of a legislative committee is likewise subject to constitutional restriction was decided in *Kilbourn* v. *Thompson,* 103 U. S. 168.

See also:

McGrain v. *Daugherty,* 273 U. S. 135;
Jurney v. *MacCracken,* 294 U. S. 195.

Specifically this Court has held that such inquiry must relate to matters within the constitutional authority of Congress.

See:

Reed v. *County Commissioners of Delaware County,* 277 U. S. 376, 388;
Barry v. *United States ex rel. Cunningham,* 279 U. S. 597, 614.

The first question to be considered in any particular case, therefore, is whether the general subject matter concerning which the committee of Congress is authorized to make an investigation is a subject matter with which Congress can constitutionally deal. That requires a study of the resolution creating the particular committee and the activities of the committee acting under the resolution insofar as these throw light on the meaning of the resolution itself.

The majority of the Court of Appeals appears to have dealt with this case on the assumption that investigation may be proper of a subject matter although Congress might not have power to legislate with regard to it, citing in support of that proposition *Interstate Commerce Commission* v. *Goodrich Transit Company,* 224 U. S. 194, at 211. The fallacy of reliance on that case is readily apparent if the problem is couched in language more germane to the present situation. It is clear, of course, as repeated decisions of this Court have indicated, that Congress under the commerce clause can in many situations deal with commerce wholly intrastate because of the impact of such commerce on that which is interstate. For that reason in any inquiry dealing with interstate commerce, many subjects can be looked into which affect local commerce only. Without such inquiry Congress might not properly be able to legislate concerning the interstate commerce itself. Nevertheless, we venture to suggest that no court would uphold an unrestricted investigation by a Congressional committee or federal agency into the entire commerce of the country. Such a resolution would clearly be beyond the power of Congress and could not be supported by the argument that some information with regard to interstate commerce would be obtained or that some of the local matters inquired into might lead to appropriate legislation with regard to

interstate commerce. On the other hand, a resolution authorizing an inquiry into any particular aspect of interstate commerce might in a particular setting permit questions to be asked about local commerce because of the impact of such commerce on that which moved across state lines.

So, in the present situation, we submit that no general inquiry into matters relating to opinion or affecting freedom of association is permissible although in an inquiry properly limited to matters concerning which Congress could constitutionally legislate, questions might be asked of a broader scope if the relevancy of the questions to the particular inquiry appeared.

Particularly do we submit that such should be the rule where the resolution creating the inquiry uses terms of reference so vague as to be legally without meaning.

2. It can hardly be disputed that the resolution here in question invades areas protected by the First Amendment. This Court has been in recent years particularly astute to protect freedom of speech, freedom of religion and freedom of assembly from all kinds of encroachment by the Congress or the states. In so doing it has declared that these rights are preferred and that the usual presumption of constitutionality in favor of legislative acts should not be indulged in when these rights are involved.

This Court has not restricted its concern to cases where there was a direct interference with those great freedoms, but has struck down any attempts to impinge upon them by indirection. In *Murdock* v. *Pennsylvania,* 319 U. S. 105, it held void municipal ordinances which sought to apply an ordinary and insignificant license tax to sales of religious pamphlets. In *Thomas* v. *Collins,* 323 U. S. 516, it struck down an attempt to limit certain kinds of speech by registration requirements. In *Illinois ex rel. McCollum* v. *Board*

of Education, 333 U. S. 203, this Court held to be a violation of separation between Church and State any use of school buildings for sectarian purposes.

The Court has also shown concern over the right of assembly, repudiating the doctrine of guilt by association.

See:

DeJonge v. *Oregon,* 299 U. S. 353;
Schneiderman v. *United States,* 320 U. S. 118;
Baumgartner v. *United States,* 322 U. S. 665.

This Court has been particularly concerned where the attack on freedom was couched in vague terms.

See:

Stromberg v. *California,* 283 U. S. 359;
Herndon v. *Lowry,* 301 U. S. 442.

These views were recently reiterated in *Winters* v. *New York,* decided March 29, 1948.

While it is true that in most of the cases above cited the challenged governmental action was embodied in a law which forbade action, it is submitted that the same principle is applicable to a resolution of inquiry as the result of which criminal sanctions may be imposed.

For the essential reason for the striking down of these laws, particularly where they are vague ones, was expressed by Mr. Justice Murphy in *Thornhill* v. *Alabama,* 310 U. S. 88, 97, 98, where he said:

> **"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."**

The question in every case must be whether or not the governmental action involved is a threat to any of the freedoms guaranteed by the First Amendment.

We believe that there can be no doubt but that the inquiry authorized by this resolution constitutes such a threat. On its face and as it has been applied by the actions of the Committee during its many years of existence, the purpose of the Committee has been primarily to bring into popular disfavor those persons and those ideas which the majority of the Committee (or sometimes even only a single member of it) thought undesirable. The activities of this Committee have been canvassed by many persons. We call attention primarily to the note which appeared in 47 Columbia Law Review 416, to the discussion of the Committee's treatment of the Southern Conference on Human Welfare by Professor Gellhorn in 60 Harvard Law Review 1193, and to Ogden "The Dies Committee".

In effect Congress has by the creation of this Committee authorized the compulsory disclosure, under penalty of prison sentence, by anyone of any opinion, political, social, religious or otherwise, which the Committee thought might have some relation to the vague and general subject matter of its inquiry. We submit that this may not constitutionally be done. See *West Virginia State Board of Education* v. *Barnett,* 319 U. S. 624; *Ballard* v. *United States,* 322 U. S. 78.

More serious, perhaps, than the compulsory disclosure of opinion is the threat which the mere existence of such a committee has on the expression of opinion and the conduct of wholly legal activities throughout the nation.

In closing, we wish to call attention to the statement of the High Court of Australia in *Colonial Sugar Refining Company* v. *Attorney General,* 15 C.L.R. 182. There it

had been suggested that the power to initiate a Constitutional Amendment authorized inquiry into a subject matter otherwise closed. This argument was rejected in the following language:

> "If it is sound every inhabitant of the Commonwealth is liable to an inquisitional investigation conducted under the federal power as to his most intimate private affairs."

3. All of the foregoing considerations are particularly relevant here because of the vagueness of the terms of reference. The terms used in the resolution are "un-American" and "subversive." There is also reference to attacks on "the principle of the form of government as guaranteed by our Constitution."

It can hardly be disputed that if this had been a statute directly punishing propaganda or activities of the kind described it would be void under the Fifth Amendment. See *Musser* v. *Utah*, 333 U. S. 95, and *Winters* v. *New York*, decided March 29, 1948. In the last case Mr. Justice Reed said:

> "Statutes which include prohibitions of acts fairly within the protection of a free press are void."

This resolution clearly covers within its scope all kinds of wholly lawful propaganda, if indeed it is in any way directed at unlawful propaganda. For there is nothing in the term "un-American" which connotes illegality. Nor can it be said that attempts to change the fundamental character of the Constitution are illegal. Even the word "subversive" does not necessarily connote violation of law. It must not be forgotten that not much more than a century ago there were judges who declared that it was subversive to advocate universal suffrage. See May, "Constitutional History of England," vol. 2, pp. 38-41.

Aside from the fact that the resolution is aimed at wholly lawful matters, it is clear also that its scope is so broad that no one can determine whether or not a particular inquiry properly comes within the terms of reference. As has been elaborately demonstrated in petitioners' brief and in the various analyses of the work of this Committee, no meaning whatever has been ascribed to its terms. While the word "subversive" might be susceptible of an interpretation which would limit it to activities by unlawful means, the fact is that that word has not been so restricted. The word "un-American" is inherently incapable of definition for it reflects merely the prejudices of the moment. Any number of things now accepted as commonplaces, such as the income tax, unemployment insurance, social security, have been at one time or another declared to be un-American. It is an epithet, a term of opprobrium, not a term of legal art.

In the *Winters* case this Court referred with approval to the decision in *State* v. *Diamond,* 27 New Mexico 477, where a law was held void because it made no distinction between lawful and unlawful advocacy of change of government.

See also:

State v. *Klapprott,* 127 N. J. Law, 395.

Indeed this Court in *Taylor* v. *Mississippi,* 319 U. S. 583, struck down a Mississippi law which punished the distribution of literature "calculated to encourage disloyalty".

Whether the matter be viewed merely under the due process clause of the Fifth Amendment or in the broader context of the First Amendment, the result is inescapable that here is a threat to all freedom of speech and of association, because no one can determine whether he comes within its terms or not.

It will not do to brush this argument aside, as did the majority of the Court of Appeals, by the reference to the *Sinclair* case (279 U. S. 263) that the accused was bound rightly to construe the statute—that is, the statute requiring testimony. In that case, no question of the meaning of the resolution establishing the committee was involved. The only argument made was that the refusal to answer had been based upon advice of counsel given in good faith. That is a far different situation from the one here presented, where the contention is that no one can determine whether or not he comes within the scope of the inquiry because of the vagueness of its terms of reference. The same considerations affect such a situation as when a person is called on to determine whether or not contemplated action is illegal.

CONCLUSION

It is respectfully submitted that this case presents questions of such far-reaching importance that it should be reviewed by this Court.

Respectfully submitted,

American Civil Liberties Union
Amicus Curiae
Osmond K. Fraenkel,
Counsel.

Devereux McClatchey,
Of the Georgia bar,

Francis Goodale,
Of the Massachusetts bar,

Emanuel Gordon,
Arthur Garfield Hays,
Of the New York bar,
Of Counsel.

FILE COPY

Office - Supreme Court, U.
FILED
MAY 29 1948
CHARLES ELMORE CROPLE
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 766.

EDWARD K. BARSKY, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

NATIONAL LAWYERS GUILD,
ROBERT W. KENNY, *President,*
DAVID REIN, *Counsel,*
1105 K Street, N.W.,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 766.

EDWARD K. BARSKY, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

The National Lawyers Guild is an organization of members of the bar, devoted among other things to the protection of our democratic institutions and the civil rights and liberties of all the people. It believes that the denial of certiorari in this case would leave unreviewed a decision which makes a vital departure from the constitutional principles established by this Court, and would destroy protection heretofore afforded by the Constitution to our basic democratic institutions and the civil rights and liberties of all the people. For these reasons, it has secured the consent of the parties to the filing of this brief, as amicus curiae.

I.

The Present Case Presents Novel Issues of Tremendous Significance Both Nationally, and Throughout the World.

This case involves the most significant issue whether freedom of speech, press, assembly and personal liberty shall be maintained as a vital force in our national life, and as an example to other nations. The deep inroad upon these freedoms, of the decision below, was clearly set out in the dissent of Justice Edgerton:

> That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the court concedes it. The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak.

The President's Committee on Civil Rights has recently reported that public excitement about "Communists" has engendered "a state of near-hysteria" which "threatens to inhibit the freedom of genuine democrats". *To Secure These Rights,* (1947) 49. More than any other single agency or group, the House Committee on Un-American Activities has contributed to this near-hysteria. The distorting "exposures" of the Committee have imperiled the survival of virtually every organization with liberal political and economic aims.

The hysteria resulting from the continuous campaign of the House Committee designed to create the belief that individuals or organizations not conforming with its concept of orthodoxy are "un-American" and hence "disloyal," has made rapid strides in recent months. We have seen and are continuing to see the necessary consequences

of such a campaign. The concept that government officials can prescribe orthodoxy and compel conformity is rapidly becoming the accepted fashion. It has spread to the executive department,[1] to state legislative committees, and even local law enforcement agencies. It has invaded our trade unions, our educational institutions, and our civic organizations. Individuals or organizations that have received the brand of "un-American" or "subversive" are denied access to audiences, and refused meeting places in public schools and auditoriums and in private meeting halls and hotels. And as a final and inevitable sequel, their meetings are attacked and broken up by violence, their leaders are assaulted and beaten. The pattern of violence against the expression of ideas which occurred against the abolitionists in the pre-Civil War period, the socialists and radicals in 1919 and the early 1920's, is being repeated today against those the House Committee labels as "un-American". The pattern has so far progressed that we can find the Chief of police of our fifth largest city stating:

> Teddy Roosevelt would turn over in his grave were he to know that such un-American activities and such an un-American leader as that of Wallace are now being supported by the Progressive Party of Michigan. . . .
>
> I have no doubt that you object to statements that were made by me, especially when I said that all those engaged in un-American Activities ought to be either shot, thrown out of the country, or put in jail.[2]

This trend was commented upon in a letter sent by twenty-two members of the faculty of Yale University Law School, on November 26, 1947, to the President of the United States, the Secretary of State, and the Speaker of the House of Representatives. The letter reads in part:

> . . . There are alarming signs that persecution for opinion, if not curbed, may reach a point never hither-

[1] Executive Order 9835, and the actions of the Attorney General implementing it.

[2] New Republic, April 5, 1948, at p. 8.

> to attained even in the darkest periods of our history. With it, we may expect racial, religious and every other kind of bigotry which, if it is to run its full course, can loose such a flood of intolerance as utterly to destroy the civil liberties without which no democratic society can survive.
>
> A pattern of suppression is today evolving at the highest levels of the Federal Government. The more alarming aspects of the situation include the President's Loyalty Order of last spring, the recent "Statement of Security Principles" by the Department of State and the current performance of the Un-American Activities Committee of the House of Representatives . . .
>
> . . . Under the cloak of congressional immunity or the cloak of anonymity, high officials of the national Government are today acting in disregard and in defiance of the American tradition of civil liberties and, in our considered judgment, in violation of the Constitution of the United States.[3]

The effect of the Committee's activities reaches beyond the organizations and individuals condemned as "un-American" by the Committee. The same threat hangs over others through the fear that they may receive the same treatment. As they observe the effect on organizations and individuals condemned by the Committee, other organizations will necessarily adopt a cautious and "go slow" policy. They will hesitate to criticize the government, or take views on political or economic matters at variance with those held by the House Committee. Thus, debate and discussion on the most vital political and economic issues can no longer be free and unfettered. Words must be watched and weighed. Ideas can be urged and positions taken not solely on the basis of conviction or reason. It is now necessary to consider also whether these ideas and positions will meet with the approval of the House Committee.

But the effectiveness of our democracy lies in the freedom of our people to organize voluntarily into associations,

---

[3] Quoted in part in New York Times, November 27, 1947, p. 38.

whether religious, political or economic, and in such organizations freely, without any governmental restraint, to discuss economic, political or social problems, and to present to governmental authorities and the people, their views on any and every subject. *Thomas* v. *Collins,* 323 U. S. 516; *U. S.* v. *Cruikshank,* 92 U. S. 542; *DeJonge* v. *Oregon,* 299 U. S. 353; *Hague* v. *CIO,* 307 U. S. 496. Self-government can succeed only where the people have full opportunity to hear and discuss all shades of opinion, all proposals for change or reform in our economic, social or political system. *To Secure These Rights,* p. 47; *The Constitutional Right to Advocate Political, Social and Economic Change,* Vol. VII, No. 2, Lawyers Guild Review, 57. This freedom to organize, this opportunity to hear and discuss, are the very things the Committee has set itself up to restrain and suppress. The activities of the Committee, upheld by the decision below, have not only met with the resounding condemnation of many of the foremost public citizens in our country,[4] but have evoked the comment abroad that our country, the birthplace and the shrine of freedom and liberty, today enjoys less freedom and liberty than exists in European countries.[5]

---

[4] For a few examples see *Hollywood on Trial,* supra, pp. 135-151, 215-226. The conservative New York Herald Tribune said of the Committee: " . . . the beliefs of men and women who write for the screen are, like the beliefs of any ordinary men or women, nobody's business but their own, as the Bill of Rights mentions. . . . Neither Mr. Thomas nor the Congress in which he sits is empowered to dictate what Americans shall think." From editorial of October 22, 1947. And the Chicago Times said: "Of course the real object . . . is to smear New Dealers and whatever their progressive successions may be called." From editorial of October 22, 1947.

[5] Editorial, Washington Post, April 29, 1948, entitled "As others See Us." According to an Associated Press London dispatch, "Newspapers of the left, center, and right alike used such terms as 'Hollywood witch hunt,' 'nauseating spectacle,' and 'antics of a circus load of film stars' " to describe the Committee's investigation of Hollywood. P. M., October 27, 1947, p. 3. The Observer of London, in an editorial entitled "Star Chamber" commented: "Why then, should Americans in the film industry not enjoy that

Perhaps the most eloquent of such comments has been made by Dr. Thomas Mann, who, like other Europeans, sought refuge in this country from political tyranny and remained to contribute to and enrich our society:[6]

> I testify, moreover, that to my mind the ignorant and superstitious persecution of the believers in a political and economic doctrine which is, after all the creation of great minds and great thinkers—I testify that this persecution is not only degrading for the persecutors themselves but also very harmful to the cultural reputation of this country. As an American citizen of German birth, I finally testify that I am painfully familiar with certain political trends. Spiritual intolerance, political inquisitions, and declining legal security, and all this in the name of an alleged "state of emergency" . . . that is how it started in Germany. What followed was fascism and what followed fascism was war.[7]

---

freedom of thought guaranteed by the Constitution? . . . it would be a poor bargain to keep the atom secrets and lose those freedoms which are the secret of America's greatness." October 26, 1947, p. 4. Don Iddons Diary in the Sunday Mail of Brisbane, Australia, has this to say: "I have no time for Communism, but consider that this investigation is a witch hunt, a Donnybrook Fair, and a high-pressure farce." November 2, 1947.

[6] Cf. Statement by Federal Communications Commissioner Clifford J. Durr before Federation of Atomic Scientists, in commenting on attacks by the Committee on Dr. Edward Condon, Director of the Bureau of Standards: "Because of repression in Europe the United States gained Einstein, Szilard and Fermi," quoted on page 1, of Washington Post, May 1, 1948.

[7] Foreword to *Hollywood on Trial, supra.* Cf. The Statement of the House of Bishops of the Protestant Episcopal Church in the United States with regard to the practices of this committee: "an inquisitorial investigation of men's personal beliefs is a threat to freedom of conscience." (New York Herald Tribune, November 8, 1947, p. 4.)

II.

The Decision Below is in Conflict With Constitutional Principles Established by this Court.

(1) *The decision below repudiates the "clear and present danger" doctrine.*

The majority of the Court below stated frankly that the legislation establishing the Committee and the actions of the Committee constituted an infringement upon the free speech of petitioners and others. It nevertheless upheld the Committee's power, admittedly in the absence of any showing of a clear and present danger, on the ground that Congress has power to inquire into "threats to the existing form of government by extra-constitutional processes of change." The Court below said that the clear and present danger doctrine did not apply since the statute here involved, authorized a legislative inquiry, and did not, as in other cases, involve a direct restriction upon speech or publication. But "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws." Stone J. in *Jones* v. *Opelika*, 316 U. S. 584, 609. In the same vein, is the statement of Justice Jackson concurring in *Thomas* v. *Collins*, 323 U. S. 516, 546:

> It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control.

Thus, the protection of the First Amendment applies to all, not some, legislative acts. And this Court has held that the First Amendment prohibits the regulation or restriction of expression unless the words used are used in such circumstances and are of such a nature as to create a "clear and present danger" of an "extremely serious"

substantive harm which Congress may directly prevent. *Bridges* v. *California*, 314 U. S. 252; *Thornhill* v. *Alabama*, 310 U. S. 88; *DeJonge* v. *Oregon*, 299 U. S. 353; *Near* v. *Minnesota*, 283 U. S. 697; *Schenck* v. *United States*, 249 U. S. 47. The doctrine of the Court below, if sanctioned, would justify any infringment of the rights guaranteed by the First Amendment, on the ground that such an infringement was an indirect one, and on the mere assertion that the action taken was desirable to protect the government. But the protection of the First Amendment, already limited by the clear and present danger doctrine, is not to be abandoned because the repression is indirect rather than direct. The Bill of Rights cannot be circumvented by use of indirection. Cf. *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *United States* v. *Lovett*, 328 U. S. 303.

(2) *The decision repudiates the doctrine of this Court that, in the field of free speech, a statute invalid on its face because of vagueness cannot be saved by a narrowing judicial construction.*

The majority of the Court below apparently conceded that one portion of the resolution, that dealing with the investigation of "un-American propaganda activities" was fatally vague, but by some ledgerdemain determined that the present inquiry was not conducted under this portion of the resolution, but under another. The Court sustained another, and equally vague portion of the resolution ("subversive and un-American propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution") on the ground, apparently, that Congress has power to inquire into "threats to the existing form of government by extra-constitutional processes of change." But the resolution says nothing about "threats to the existing form of government by extra-constitutional processes of change" and no such inquiry was involved in the present case. The resolution, on the contrary, is without limits and

has been utilized to intimidate and injure any and every movement for economic or social reform.

The Court's effort to save the statute by brushing aside one portion of the resolution, which it concedes to be fatally vague, and rewriting another portion with complete violence to the actual language of the resolution itself, is the grossest kind of judicial legislation.

This Court has held that a statute so vague as to be invalid on its face cannot be rewritten by a Court, since an attempted saving construction would usurp the legislative function. *United States* v. *Rease*, 92 U. S. 214, 221. This principle is particularly to be applied in the field protected by the First Amendment, since the very generality of the resolution offends the protections guaranteed by the Amendment. If the statute because of its vagueness or breadth can be applied to cover constitutionally protected activities, the Court cannot uphold it as applied to non-constitutionally protected activities. *Winters* v. *State of New York*, decided March 29, 1948; *Thornhill* v. *Alabama*, 310 U. S. 88, 97; *Stromberg* v. *California*, 283 U. S. 359, 369, 370; cf. *Jones* v. *S. E. C.*, 298 U. S. 1, 27.

(3) *The decision below sustains the Committee's practice of exposure and blacklist, a power beyond the limits of Congressional authority established by decisions of this Court.*

It is obvious from the record of this Committee that it is not a committee of inquiry but a committee which utilizes its power to compel conformity under threat of blacklisting and exposure. And it sets itself up to mold public opinion in conformity with the Committee's notion of right and wrong, of orthodoxy and unorthodoxy. This is clearly demonstrated by accepted methods of legislative interpretation.[8] From the legislative debates and acts and the prac-

[8] "In passing upon constitutional questions . . . the statute must be tested by its operation and effect." *Near* v. *Minnesota*, 283 U. S. 697, 711.

tices of the Committee,[9] Justice Edgerton concluded: "The case is as if the enabling Act read 'The Committee shall expose unorthodox propaganda in order to restrain and punish it' ". But no governmental authority "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." . . . "authority . . . is to be controlled by public opinion, not public opinion by authority." *Bd. of Education* v. *Barnette,* 319 U. S. 624, 641, 642.

> "The very purpose of the First Amendment is to preclude public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas* v. *Collins,* 323 U. S. 511, 545.

No enumerated power of Congress gives an authority to "expose", to censor opinion and expression, or to blacklist individuals for political and economic views. Hence the Committee's authority violates the Ninth and Tenth Amendments. *Kilbourn* v. *Thompson,* 103, U. S. 168; *McGrain* v. *Daugherty,* 273 U. S. 135; *Jurney* v. *MacCracken,* 294 U. S. 125; *Sinclair* v. *United States,* 279 U. S. 263; cf. *Marshall* v. *Gordon,* 243 U. S. 521.

(4) *The Committee's authority violates the Fourth Amendment as it has been interpreted by the Court.*

The availability and use of process to compel testimony, without adequate foreknown standards for the inquiry, violates the Fourth Amendment's prohibition of unreasonable searches and seizures. *Jones* v. *S. E. C.,* 298 U. S. 1, 25, 26, 27, 28. The use of such vague words as "un-American"

---

[9] Note, Constitutional Limitations on the Un-American Activities Committee, 47 Col. L. Rev., 416; Kahn, "Hollywood on Trial" (1948, Boni and Gaer. See also material set out in footnotes 13 to 21 of Justice Edgerton's dissent.)

and "subversive" places no bounds on the Committee's scope and the reach of its subpoena, except the Committee's whim and caprice. The compulsion of testimony authorized by the resolution is limited only by the Committee's unbridled discretion.

This Committee's authority and conduct fall squarely within the constitutional prohibition described in *Re Pacific R. Commission*, 32 F. 241, from which the following passage (at 263) was quoted with approval in the *Jones* case, *supra* (at 27):

> A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it could end.

Conclusion.

Since long past this Court has asserted its power to review the validity of legislative and executive actions. With the power has come a responsibility, "the duty our system places on this Court to say where the individual's freedom ends and the State's power begins." *Thomas* v. *Collins*, 323 U. S. 516, 529. The obligation on this Court to protect the guarantees of the First Amendment is of the highest order. *Board of Education* v. *Barnette*, 319 U. S. 624, 640. The Court has "no higher duty, no more solemn responsibility" than "that of translating into living law and maintaining this constitutional shield" of the Bill of Rights. *Chambers* v. *Florida*, 309 U. S. 227, 241. Judicial review, it has assured us, will protect individuals from legal assertions of Congress' privilege of inquiry. *Jurney* v. *MacCracken*, 294 U. S. 125, 150. Nor is the size of judicial re-

view any narrower where the encroachment upon the Bill of Rights is indirect rather than direct.[10]

We ask the Court in this, "one of the more momentous"[11] issues ever to come before it, to discharge this duty and to redeem its pledge. In this we are joined, we are confident, by many millions of citizens who, like Justice Edgerton dissenting below, "hope the last word has not been said on the question" of the legality of the Committee's inquest into political and economic views.

The responsibilities of judicial review place upon this Court the heavy burden of insuring that no Act of Congress or the Executive can deny the fundamental liberties guaranteed by the Bill of Rights. This Court is the last remaining Constitutional protection against these assaults upon civil liberties. To permit the Resolution creating the House Committee and its activities, which constitutes so potent an attack against the exercise of these fundamental rights, to remain unreviewed, would be to abdicate this responsibility and to nullify the concept of judicial review.

Respectfully submitted,

NATIONAL LAWYERS GUILD,
ROBERT W. KENNY, *President*,

DAVID REIN, *Counsel*,
1105 K Street, N.W.,
Washington, D. C.

---

[10] See Jackson, J. convening in *Thomas* v. *Collins, supra*, at p. 547: "If this Court was not or does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one."

[11] Judge Clark dissenting in *Josephson* v. *United States*, 165 F. (2d) 93 (C. C. A. 2, 1947).

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 2 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 766.

EDWARD K. BARSKY, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA.

BRIEF OF SOUTHERN CONFERENCE FOR HUMAN WELFARE, AMICUS CURIAE.

JOSEPH FORER,
1105 K Street, N. W.,
Washington, D. C.
Counsel for Southern Conference for Human Welfare,

CLARK FOREMAN, *President.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 766.

EDWARD K. BARSKY, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA.

BRIEF OF SOUTHERN CONFERENCE FOR HUMAN WELFARE, AMICUS CURIAE.

I.

The Southern Conference for Human Welfare is an organization whose purpose, as stated in its by-laws, is "to promote the general welfare and to improve the economic, social, political, cultural, and spiritual condition of the people of the South, without regard to race, creed, color, or national origin." Pursuant to the consents of the parties hereto the Southern Conference for Human Welfare files this brief, as amicus curiae, in support of the petition for certiorari, because it believes that the issues involved have a vital bearing on its program and purposes.

The plain fact is that the depressed status of the negro and poorer white classes in the South is a function of an economic dominance of the South by various interests and groups existing in both North and South. This economic dominance is supported by a political control of municipal and state governments and of federal primaries, and is characterized by the effective disfranchisement of a large portion of the population.

Against so formidable and well-entrenched a system, having at its disposal the powers of the state, individuals of opposing interests cannot peacefully compete unless they are free to assemble, to propagate their views, and to organize to unite their efforts and strength. Naturally enough, therefore, the dissenting individuals and groups constantly encounter restrictions on their constitutional freedom to assemble, to speak, and to organize. These restrictions are both governmental and extra-governmental, as, for example, ordinances against non-segregated meetings and mob lynchings.

It is a grievous circumstance that the federal government has actively participated in the repression of the liberties of those who seek a more progressive South. This participation has been taken through the medium of the Committee on Un-American Activities of the House of Representatives. The Committee, acting under the guise of an "investigative" agency, has conducted a vigorous and unremitting campaign of propaganda and censorship by "exposure" and blacklisting, designed to intimidate individuals into surrendering their rights of speech and assembly and to discredit liberal organizations. Justice Edgerton's dissenting opinion below cites enough documented instances of this campaign to render further citations superfluous.

The technic of the Committee has been to stage hearings as "investigations," to issue reports as "findings," and to compile blacklists, all on the theory that it is exposing a Communist menace. Having managed to create a hysterical fear and hatred of Communism, both doctrinal and ac-

tive, it proceeds to damage organizations and individuals by smearing them with a red brush dipped into a solution of distortions and falsifications. *Cf.* Gellhorn, *Report on a Report of the House Committee on Un-American Activities,* 60 Harv. L. Rev. 1193, dealing with the Committee's attack on the Southern Conference for Human Welfare.

The federal government, therefore, through a statutory agency, the Committee on Un-American Activities, has added restriction of speech and assembly by "investigation," "exposure" and blacklisting to the non-federal restrictions encountered in the South and elsewhere by liberal movements. The actions of the Committee are of a piece with ordinances against non-segregated meetings and mob lynchings. Each case simply presents a mechanism to prevent effective, peaceful and constitutional advocacy of changes detrimental to the economic interests of privileged groups.

II.

In the light of this harsh reality, the majority opinion below is seen to be impertinent. The issue is not whether Congress may constitutionally inquire into political beliefs (though we think it plain enough that it may not), but whether Congress may suppress political expression under the pretext of making an inquiry. The issue is not whether the implied power to investigate may be exercised to determine whether a clear and present danger is posed by types of speech and assembly, but whether Congress may restrain whatever speech and assembly it considers distasteful if only it does so under a recital that it is merely investigating.

Obviously the true issues, and even perhaps the fictitious issues, are of grave moment. Whether the Committee on Un-American Activities may continue to employ compulsory process is a question of great importance to every liberal and reformist cause and to the future of our democratic institutions. This question likewise involves signifi-

cant legal issues as to the meaning, effect and vitality of the Constitution. Moreover, these issues, we submit, were erroneously disposed of below, and regardless of error were inadequately considered.

The *Barsky* case is, finally, an appropriate controversy for the review of these important issues by this Court. The activities of the Committee on Un-American Activities have been made possible by a legislative grant to the Committee of a power to compel testimony which is in no way limited by the vague and meaningless definition of the Committee's jurisdiction. By resisting the assertion of this power, the petitioners properly call into question the validity of the power. *In re Chapman,* 166 U. S. 661; *Sinclair* v. *United States,* 279 U. S. 263; *Jurney* v. *MacCracken,* 294 U. S. 125.

CONCLUSION.

The writ of certiorari should issue as prayed for by petitioners

Respectfully submitted,

JOSEPH FORER,
1105 K Street, N. W.,
Washington, D. C.
Counsel for Southern Conference for Human Welfare,

CLARK FOREMAN, *President.*

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 7 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 766

EDWARD K. BARSKY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION C.I.O.; NATIONAL UNION OF MARINE COOKS AND STEWARDS C.I.O.; INTERNATIONAL FISHERMEN & ALLIED WORKERS OF AMERICA C.I.O.; UNITED OFFICE & PROFESSIONAL WORKERS OF AMERICA C.I.O.; AMERICAN COMMUNICATIONS ASSOCIATION C.I.O.; UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA C.I.O.; INTERNATIONAL FUR & LEATHER WORKERS UNION C.I.O.; INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS C.I.O.; UNITED PUBLIC WORKERS OF AMERICA C.I.O.; FOOD, TOBACCO, AGRICULTURAL & ALLIED WORKERS OF AMERICA C.I.O.; UNITED FARM EQUIPMENT & METAL WORKERS OF AMERICA C.I.O.; UNITED FURNITURE WORKERS OF AMERICA C.I.O.

ARTHUR G. SILVERMAN,
11 West 42nd Street,
New York 18, N. Y.,
Attorney for Amici.

INDEX

PAGE

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE 1

ARGUMENT:

I—The statute creating the House Committee on Un-American activities authorizes abridgement of the rights of speech and assembly by means of "investigation," "exposure," etc., and is therefore void under the First Amendment 2

II—A decade of experience under the investigative power granted by this statute and the identical power previously granted by House resolution to this Committee's predecessors confirm the view that it, and its entire course of practice, are and have been a continuing violation of the First Amendment 6

CONCLUSION 16

CASES CITED

A. F. L. v. Swing, 312 U. S. 321 (1941) 3

Baumgartner v. United States, 322 U. S. 665 (1944) 3

Bridges v. Wixon, 326 U. S. 135 (1945) 3

Carlson v. California, 310 U. S. 106 (1940) 4

Chambers v. Florida, 309 U. S. 227 (1940) 15

Colonial Sugar Refining Co. v. Attorney General (High Court of Australia), 15 C. L. R. 182 (1912), extended on appeal by Privy Council in L. R. (1914) App. Cas. 231 (1914) 4

De Jonge v. Oregon, 299 U. S. 353 (1937) 3

Ex parte Frankfeld, D. C. Dist. of Col. (1940), 32 Fed. Supp. 915 14

PAGE

Grosjean v. American Press Co., 297 U. S. 233 (1936) 3

Herndon v. Lowry, 301 U. S. 242 (1937) 4

Jones v. Securities and Exchange Commission, 298 U. S. 1 (1935) 3-4, 9

Jurney v. McCracken, 294 U. S. 125 (1934) 2, 9

Kilbourn v. Thompson, 103 U. S. 168 (1881) 2, 4, 8

Leubuscher v. Commissioner (C. C. A. 2, 1932), 54 F. (2d) 998 5

Lovell v. Griffin, 303 U. S. 444 (1938) 3, 4

McGrain v. Daugherty, 273 U. S. 135 (1926) 2, 9

Reeve v. Howe, E. C. Pa. (1940), 32 Fed. Supp. 619 14

Schneider v. Irvington, 308 U. S. 147 (1939) 3

Schneider v. State, 308 U. S. 147, 161, 162 6

Schneiderman v. United States, 320 U. S. 118 (1943) 3

Thomas v. Collins, 323 U. S. 516 (1945) 3, 5, 6

Thornhill v. Alabama, 310 U. S. 88 (1940) 4, 5, 6, 7

United States v. Ballard, 328 U. S. 78 (1944) 9

United States v. Blumberg, D. C. Dist. of Col. (1940), Crim. No. 65,800 14

United States v. Carolene Products Co., 304 U. S. 144, Note 4 (1938) 6

United States v. Dolson, D. C. Dist. of Col. (1946), Crim. No. 65,801 14

United States v. Lee, 106 U. S. 196 (1882) 2, 9

United States v. Lovett, 328 U. S. 303 (1946) 9, 11, 14

Yick Wo v. Hopkins, 118 U. S. 356 (1886) 7

OTHER AUTHORITIES

	PAGE
Cong. Rec., February 3, 1939	14
Cong. Rec., February 9, 1939	14
Cong. Rec., October 26, 1939	11
Cong. Rec., January 23, 1940	14
Cong. Rec., March 29, 1940	11
Cong. Rec., March 11, 1942	13
Cong. Rec., March 28, 1942	11
Cong. Rec., June 24, 1942	14
Cong. Rec., February 5, 1943	11
Cong. Rec., February 8, 1943	11
Cong. Rec., February 10, 1943	13
Cong. Rec., October 24, 1945	13
Cong. Rec., January 29, 1946	10
Cong. Rec., January 30, 1946	11, 12
91 Cong. Rec. 275	9
92 Cong., Rec. A1444 (Feb. 19, 1946)	13
Hearings 76-1, 1939, Vol. 5	12
Hearings 76-3, 1940, Vol. 12	10
H. R. Rep. No. 2, 76th Cong., 1st Sess., 13 (1939)	8
H. R. Rep. No. 1, 77th Cong., 1st Sess., 24 (1941)	8
H. R. Rep. No. 2748, 77th Cong., 2nd Sess.	11
H. R. Rep. No. 2742, 79th Cong., 2nd Sess., 16 (1947)	8
H. R. Rep. No. 2223, 79th Cong., 2nd Sess., June 7, 1946	10
40 Col. Law Rev. 531	6
47 Col. Law Rev. 427 N. 109	9
51 Yale L. J. 798, 802	6
54 Stat. 1201, 18 U. S. C. Secs. 14-17	9
Funk & Wagnall's New International Dictionary (1935)	5
Wigmore on Evidence (1940), 3rd Ed., Vol. VIII, Sec. 2195	4

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 766

EDWARD K. BARSKY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF

The undersigned trade unions, having an aggregate membership of 1,196,500, respectfully move for leave to file a brief *amici curiae* in support of the petition for certiorari herein. The written consent of petitioners' counsel has already been mailed to the Clerk for filing. Respondent's counsel has been requested to consent but no reply has yet been received.

The undersigned believe that the issues presented by such petition are fundamental to their own constitutional right to function effectively as trade unions; that if the constitutional basis here asserted for the congressional power upon which these convictions are founded be a valid one, the operations of all trade unions, including the undersigned, will be profoundly affected. This belief is pointedly justified by the declared intention of the House Committee

on Un-American Activities to conduct inquiries into ideas and opinions existing in the trade union movement, among the foreign born, the Negro people, and other specified sections of the population. New York Herald-Tribune, January 8, 1948.

Upon this declaration and the entire record of this Committee as set out in petitioner's brief and that of the *amici* already filed, the undersigned perceive such an interest in a judicial determination upon the validity of this Committee's establishment, operation and asserted authority as requires the filing of a brief *amici curiae*.

Leave to do so is, therefore, respectfully requested.

BRIEF AMICI CURIAE

ARGUMENT

I

The statute creating the House Committee on Un-American activities authorizes abridgement of the rights of speech and assembly by means of "investigation," "exposure," etc., and is therefore void under the First Amendment.

Congress' power to investigate, like any other, is limited by the Constitution and subject to judicial review. *Kilbourn* v. *Thompson*, 103 U. S. 168, 181 (1881); *U. S.* v. *Lee*, 106 U. S. 196, 220 (1882); *McGrain* v. *Daugherty*, 273 U. S. 135, 176 (1926); *Jurney* v. *McCracken*, 294 U. S. 125, 148 (1934).

Here, as we later show (Point II, *infra*) the unlimited authority to investigate "propaganda" is an unconstitutional burden upon the rights guaranteed by the First

Amendment. As between those rights and Congress' power to investigate, the former are paramount and must prevail. The Supreme Court has repeatedly so decided with reference to other powers of Government. *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *Irvington*, 308 U. S. 147 (1939); *A. F. L.* v. *Swing*, 312 U. S. 321 (1941); *Thomas* v. *Collins*, 323 U. S. 516 (1945). The power of Congress to investigate can be no exception if the primacy thus accorded the fundamental guarantees of the First Amendment is to continue. Nor are those guarantees limited to the naked right to think and speak. Their protection extends as well to political association and all the practices normally entailed in translating political ideas into action. Cf. *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Schneiderman* v. *United States*, 320 U. S. 118 (1943); *Baumgartner* v. *United States*, 322 U. S. 665 (1944); *Bridges* v. *Wixon*, 326 U. S. 135 (1945).

The constitutional invalidity of this Committee's power to investigate may not be avoided by the Government's claim that it was conferred in aid of the legislative process or, in other words, because some constitutional enactment *may* conceivably eventuate from this Committee that, therefore, this entire grant of power, in all its sweep and vagueness, is thereby validated and put beyond the reach of the Constitution and Bill of Rights. Such a claim, should it receive judicial sanction, would become a most dangerous encroachment upon the fundamental guarantees of the First Amendment. Its effect would be to permit Congress to violate the Constitution in the very process of legislating under it. It would impose upon this defendant the intolerable burden of arguing the invalidity, not only of *this* resolution, but of *any* conceivable resolution which purported to authorize an investigation into the area of speech and assembly. It would introduce into our constitutional law the startling principle that an unconstitutional means may validly be used if only the end in view *might* be constitutional. Cf. *Jones* v. *Securities and Exchange Com-*

mission, 298 U. S. 1, 25-26 (1935); *Colonial Sugar Refining Co.* v. *Attorney General* (High Court of Australia), 15 C. L. R. 182, 195 (1912), extended on appeal by Privy Council in L. R. (1914) App. Cas. 231, 257 (1914). Such is not our understanding of the Bill of Rights and we earnestly hope that this Court will not make it theirs.

The danger thus inherent in the Government's position gives particular point to the prophetic warning sounded by this Court sixty-six years ago when, as now, a roving power of investigation by the House of Representatives was asserted as a necessary adjunct of its broad legislative power under the Constitution. The Court then took occasion to warn: "It is all the more necessary that the exercise of power by this body when acting separately from and independently of all other depositories of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it, that it should receive the most careful scrutiny." *Kilbourn* v. *Thompson,* 103 U. S. at p. 192. Compare, Wigmore, *Evidence* (1940), 3rd Ed., Vol. VIII, Sec. 2195, p. 80.

Moreover, the First Amendment decisions of this Court in more recent years have consistently expounded a doctrine of civil rights which likewise cannot be reconciled with the Government's reliance here upon any supposed legislative purpose of this Committee. Thus, statutes which impinge upon constitutionally protected speech and assembly have been successively struck down without regard to ingenious speculation upon whether they might somehow lend themselves to a permitted purpose or application. Compare, *Thornhill* v. *Alabama,* 310 U. S. 88, 97-98 (1940); *Carlson* v. *California,* 310 U. S. 106, 111-112 (1940); *Lovell* v. *Griffin,* 303 U. S. 444, 450-451 (1938); *Herndon* v. *Lowry,* 301 U. S. 242, 263-264 (1937).

The statute here falls squarely within the condemnation of these cases. By its terms, the Committee may investigate "propaganda" of all kinds, foreign and domestic, its "character", "extent", "objects", and "diffusion" without any objective standard or restriction whatever. "Propa-

ganda" is "* * * a plan for publication of a doctrine or system of principles". *Leubuscher* v. *Commissioner* (C. C. A. 2, 1932), 54 F. (2d) 998, 1000; cf. *Funk & Wagnall's New International Dictionary* (1935), p. 1985. Its connotations fall entirely within the realm of opinion, thought, speech, publication, advocacy, the very things which the First Amendment declares to be immune from all Government restriction, regulation, or encroachment. Thus, this power of inquiry "* * * sweeps within its ambit * * * activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press". *Thornhill* v. *Alabama*, 310 U. S. at pp. 97-98.

To us it is too clear for argument that such an inquiry *must* abridge political thought, speech and assembly. To execute an authority defined in such terms, the Committee is bound to probe into the ideas and opinions of those whom it singles out for investigation. Thus, its entire "stock and trade" must occupy an area expressly proscribed by the Bill of Rights. This is apparent not only from the text of the Resolution itself, but will be especially so from the record of the Committee's consistent operation under it. Point II, *infra*.

Compulsory accountability to any Government body for one's political beliefs or the exercise of the right to act in furtherance of them is so abhorrent to the principles of our constitutional system that the mere provision for any such thing is enough, without more, to violate the First Amendment. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field, every person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us". Jackson, J., in *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945).

But the burdens here imposed upon constitutionally protected speech and assembly by the publicity, harassment, expense, etc., of the public (and private) "hearings" to

which this Committee may hail any person or group deemed or suspected by it to be "un-American" or "subversive", serve to confirm the inherent invalidity of this statute and will *independently* sustain its violation of the First Amendment. "The existence of * * * a statute, which readily lends itself to harsh and discriminatory enforcement * * * against particular groups deemed to merit * * * displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded within its purview". *Thornhill* v. *Alabama,* 310 U. S. at pp. 97-98.

We treat this more fully in the point that follows.

II

A decade of experience under the investigative power granted by this statute and the identical power previously granted by House resolution to this Committee's predecessors confirm the view that it, and its entire course of practice, are and have been a continuing violation of the First Amendment.

The usual presumption of constitutionality attaching to acts of Congress does not apply when the guarantees of the First Amendment are involved. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152-153, Note 4 (1938); *Thornhill* v. *Alabama,* 310 U. S. 88, 95-96 (1940), citing *Schneider* v. *State,* 308 U. S. 147, 161, 162; *Thomas* v. *Collins,* 322 U. S. 516, 529-530 (1945); cf. 40 Col. L. Rev. 531; 51 Yale L. J. 798, 802. "It is imperative that when the exercise of these rights is claimed to be abridged, the Courts 'should weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations". *Thornhill* v. *Alabama, supra,* p. 96.

We can think of no better test by which to "weigh the circumstances" and "appraise the substantiality of the reasons" for this statute than the pragmatic one of experi-

ence derived from its actual application and enforcement. Compare *Thornhill* v. *Alabama, supra,* p. 98; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373-374 (1886). Applying that test, it becomes apparent that the manner in which this Committee has consistently exercised its power, the things done and said and attempted in pursuance of it, the purposes which it was avowedly invoked to serve—all combine to show the inherent want of this Committee's constitutional authority and confirm our position on the face of the statute that its purpose and effect are, and always have been, to proscribe and penalize political speech and assembly in violation of the First Amendment.

It would unduly protract this brief to refer to all the abuses practiced by this Committee* which point to and, in many instances, establish its constitutional invalidity.

Many of these the Trial Court excluded, erroneously, we believe, in view of their undoubted relevance under the constitutional doctrine of the *Thornhill* and other cases, *supra.* We refer specifically to such offers of proof as the Committee's harassment of its own members' political opponents and others, including these petitioners (R. 329-331, 336-337, 338, 461, 463, 464-465, 470, 498, 579); of its flagrantly undemocratic procedures (R. 479); of its public condemnation of witnesses without affording them an opportunity to be heard (R. 483, 580); of its consistent abuse of witnesses whose political views it disapproved (R. 392-407, 420, 476, 471-473, 479).

---

* The present Committee is the successor, without change in character or authority, of the Dies and Wood-Rankin Committees of prior Congresses. The identity in function, power and avowed purpose is so complete that the entire succession may be regarded, for all but purely formal purposes, as one continuing Committee. For the prior resolutions, see H. Res. 282, 75th Cong. 3rd Sess.; 83 Cong. Rec. 7568, 7586 (1938); H. Res. 26, 76th Cong. 1st Sess.; 84 Cong. Rec. 1098, 1128 (1939); H. Res. 321, 76th Cong. 3rd Sess.; 86 Cong. Rec. 572, 605 (1940); H. Res. 90, 77th Cong. 1st Sess., 87 Cong. Rec. 886, 899 (1941); H. Res. 420, 77th Cong. 2nd Sess., 88 Cong. Rec. 2282, 2297 (1942); H. Res. 65, 78th Cong. 1st Sess., 89 Cong. Rec. 795, 810 (1943); H. Res. 5, 79th Cong. 1st Sess., 91 Cong. Rec. 10, 15 (1945).

All these matters should have been received under a rule of proper latitude. They go directly to a constitutional issue that is fundamental to a determination of this case. Their exclusion was reversible error.

But this Committee's violations of constitutional right go far beyond the particular instances offered in the Court below. Evidence of many other abuses, some even more flagrant, is to be found in the Congressional Record and other sources within the judicial notice of this Court. We make brief reference to some of the more outstanding, which, we believe, will be enough for our purpose.

First, there is the Committee's repeated avowal that its major end and purpose are not legislation but "exposure" of individuals and groups whose views it deems incompatible with its own undefined conception of Americanism. It openly admits this purpose in a more recent report. Thus, "The House Committee on Un-American Activities is empowered to explore and expose activities by un-American individuals and organizations which, while sometimes being legal, are nonetheless inimical to our American concepts and our American future * * *" H. R. Rep. No. 2742, 79th Cong., 2nd Sess. 16 (1947). See also, H. R. Rep. No. 2, 76th Cong., 1st Sess., 13 (1939); H. R. Rep. No. 1, 77th Cong., 1st Sess., 24 (1941).

From the Committee's constant devotion of its energies to this arrogated function of "exposure" some of its most flagrant constitutional abuses have arisen. Hence, these open and repeated avowals lend particular emphasis to our entire constitutional argument under this head. For, in our view, "exposure" is wholly outside the constitutional province of a Congressional Committee. The major function of Congress is to legislate. All else it does must, unless otherwise authorized by the Constitution itself, be in aid of valid legislation. No other conclusion is possible under our constitutional system of separate powers. It was explicitly so held in *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881), where this Court denied effect to a House Committee's process precisely because its investigation

went beyond the legislative province.* That decision has since been repeatedly affirmed and applied for this same principle and is unquestionably the law today. Compare, *United States* v. *Lee,* 106 U. S. 196, 220 (1882); *McGrain* v. *Daugherty,* 273 U. S. 135, 176 (1926); *Jurney* v. *MacCracken,* 294 U. S. 125, 134 (1934); *Jones* v. *S. E. C.,* 298 U. S. 1, 25-26 (1935). Cf. *United States* v. *Ballard,* 328 U. S. 78 (1944).

But the importance of this "exposure" purpose lies not only in its overreaching *any* Congressional Committee's permitted scope. What is even more important is that *this* Committee's almost exclusive preoccupation with "exposure" independently attests the inherent invalidity of its entire power to investigate. For such preoccupation, considered with the virtual absence of any valid legislation emanating from the Committee,† are a tell-tale measure of the frustration which the First Amendment imposes upon the possibility of valid legislation within the framework of its powers. In a word, it has been remitted to this invalid function of "exposure" precisely because it could validly do nothing else.

All this becomes even clearer from the particulars of this "exposure" practice now accumulated over the decade of the Committee's activity. These establish an unvarying pattern of constant preoccupation with ideas and opinions deemed suspect or unsuitable by Committee members and unremitting use of "exposure" as a threat whereby to penalize and control such political thought and utterance.

---

* It is most significant, in this connection, that in proclaiming this "exposure" function, the Committee has expressly referred to itself as the "grand jury" of America. 91 Cong. Rec. 275.

† Only two measures have ever been associated with the Committee's decade of hearings, reports, etc. One was held unconstitutional as a bill of attainder (*U. S.* v. *Lovett,* 328 U. S. 303, 308 [1946]); the other (54 Stat. 1201, 18 U. S. C. Secs. 14-17) was merely introduced by a Committee member. Since attaining status as a standing Committee no legislation whatever has come from it. For comment on its notable lack of *legislative* performance, see 47 Col. Law Rev., 427 N. 109.

Several episodes to this effect have already been cited from this record. But they are by no means all. There are others in which the Committee showed its hand in crudest fashion. For example, it has denounced as "un-American" a whole series of political ideas as such—among them several measures of moderate social reform. See, H. R. Rep. 2748, 77-2, Jan. 2, 1945, pp. 3, 10, 13, 14, 35, 49; H. R. Rep. 592, June 16, 1947, p. 12; H. R. Rep. 2233, June 7, 1946, p. 35). There is also the Committee's letter of October 20, 1945, sent by its chief counsel to several broadcasting companies which calls attention to "* * * certain so-called news commentators who engage in expressions of opinion * * * to such an extent as to overshadow the news and emphasize the elements of propaganda", and then concludes, "I would appreciate an expression of opinion from you as to what should be done and what can be done. I hope that the stations will make it unnecessary for the Committee to recommend the passage of remedial legislation". H. R. Rep. 2223, 79-2, June 7, 1946, p. 12. A more brazen violation of the First Amendment, i. e., the attempted control of news broadcasting in a particular direction, can scarcely be imagined. In the same category is another Committee letter demanding the list of officers of an organization called "Veterans Against Discrimination" which offers the following piece of political insight by its chief counsel: "I note that you refer to democracy several times. I wonder if you are sufficiently familiar with the history of the United States to be aware that this country was not organized as a democracy * * *" (Cong. Rec., January 29, 1946, p. A740).*

In this same connection we point also to the ruthlessness with which the Committee has pursued its "exposure" purpose and the resultant degree and quality of oppression

* This is a notorious fascist "theory" of American government. Thus, William Dudley Pelley testified before this Committee: "I do not believe in this much touted democracy when our country is a republic * * * democracy means rule of the mob * * * it was not used in our original set-up by the founding fathers." Hearings, 76-3 1940, Vol. 12, p. 7283.

not hitherto associated with the processes of free Government. The Committee Chairman in 1942 boasted in the House that a certain prominent writer had been forced to resign from the Government because he (Dies) had branded him a Communist and then added, "I believe that the American people will now welcome numerous resignations or dismissals from the staff of the Board of Economic Warfare". Cong. Rec., March 28, 1942, p. 3205. In undoubted pursuance of its "exposure" purpose, the Committee has compiled its blacklist of a million persons or more, as its own report admits. H. R. Rep. 2748, 77-2. It is a matter of record that many persons have been deprived of their livelihoods, without hearing, following these *ex parte* "exposures" and other irresponsible "punitive" publicity by this Committee. Cong. Rec., March 29, 1940, p. 3695; Oct. 26, 1939, p. 815A. Two bills of attainder, added to appropriation measures to force off the Government payroll persons whose views this Committee disapproved are traceable directly to this "exposure" practice, as indeed this Court pointedly noticed as to one of them in striking it down as unconstitutional. *U. S.* v. *Lovett,* 328 U. S. 303, 308, 309, 312; cf. Cong. Rec., Feb. 8, 1943, pp. 704, 705, 707, 708; Feb. 5, 1943, pp. 654, 656.

But these "exposure" techniques have not been confined to the Committee's own denunciation and intimidation of political opinion which it disapproves. Sometimes means more subtle were made to serve the same end. Not infrequently for example, it has planned its "hearings" as a forum from which "witnesses" known to support its members' own views have been generously allotted time to denounce ideas and their advocates disapproved by the Committee. Note, for example, the following colloquy between the present Committee Chairman and the notorious Gerald L. K. Smith which we quote without comment (Hearing, 79-2, Jan. 30, 1946, p. 20):

> "Mr. Thomas: Would you say that the German-American bund was a fascist organization?
>
> Mr. Smith: I would say that it is ideologically Fascist. I would not say that it was effectively Fascist.

> The only effective Fascism that has really imperiled our people in their daily life in this country has been the administration of the New Deal bureaucracy.
>
> Mr. Thomas: Now, you have referred to the New Deal before. Would you say it was more Fascist or more Communist?
>
> Mr. Smith: I would say that they employ the ideology of the Communists and the techniques of the Fascists. I think Mr. Roosevelt was very much an imitator of Mr. Hitler.
>
> Mr. Thomas: Well, Mr. Roosevelt has passed away now.
>
> Mr. Smith: Yes, but he personified the New Deal.
>
> Mr. Thomas: Let him rest in peace. Would you say Huey Long was a Fascist?
>
> Mr. Smith: The answer is positively 'no.'"

At the conclusion of this interchange the Chairman was moved to say: "The chair expresses the appreciation of the Committee for your testimony, Mr. Smith." Hearings *supra*, p. 60. There being no dissent, he presumably spoke for the entire Committee. This treatment—typical throughout—of political-racist and fascist groups, is itself proof positive of the Committee's dominant purpose to proscribe political opinion and advocacy. It is for this reason only that we refer to it. It illustrates a particularly reprehensible technique by which the Committee accomplishes its encroachment upon the protected area of political ideas, that is, the utilization of its hearings by one segment of opinion to attack another of which Committee members disapprove.

The Committee's preoccupation with the area of political ideas with the view to stigmatizing those which its members disapprove is well illustrated by its attitude and treatment toward certain individuals and groups not coming within its particular condemnation. Thus, when a professional anti-Semite—one George Detherage—proclaiming his views at a Committee hearing, refused to answer questions about the membership and other data of his organization, no contempt citation was voted. Hearings, 76-1, Vol. 5, 1939,

p. 3455 ff. On another occasion the Committee Chairman explained the failure to "expose" such characters as Father Coughlin and Rev. Winrod with the statement that the Committee would then have been labeled anti-religious. Cong. Rec., March 11, 1942, p. 1926. Into this same category would come also its failure to inquire into such organizations as the Ku Klux Klan, the Christian Front, etc. Cong. Rec., October 24, 1945, pp. 10181-10182.

Perhaps the most abhorrent manifestation of this outlook upon its function has been the Committee's own incitement of racial and religious prejudice. It would be bad enough if this were merely the consequence of its coddling and indulgence towards fascist and anti-Semitic groups which have never failed to repay the Committee with their unstinted praise and support. See Cong. Rec., Feb. 10, 1943, p. 798. But, unhappilly, this direction of its activities is far more positively indicated. When, for example, a noted professor of Columbia University was being examined at a "closed hearing" of the Committee his interrogator, a Committee investigator, in the presence of its chief counsel, and without remonstrance from the latter, said to the professor: "You should tell your Jewish friends that the Jews in Germany stuck their necks out too far and Hitler took care of them and that the same thing will happen here unless they watch their step." 92 Cong. Rec. A872, 1444 (Feb. 19, 1946). This episode was put in affidavit form and the above quotation inserted in the Congressional Record by Congressman Sabath as part of his letter to the Committee Chairman calling for an investigation of the Committee's own staff. See 92 Cong. Rec. 1444, A872. In this connection we mention, too, the anti-Semitic harangues of the ranking minority member of the Committee on the floor of the House which, on one occasion, reached such proportions that the Speaker was obliged to intervene (Cong. Rec., Oct. 24, 1945, pp. 10187-10189); and the not unrelated manifestation, at the same session, of the Committee's studied disregard toward all pleas by Congressmen and others to inquire into the Ku Klux Klan and other specified fascist and anti-Semitic organizations (Cong. Rec., Oct. 24, 1945, pp. 10181-10182).

With this kind of outlook upon its powers and purposes illustrated by the above conduct of its members and staff, it is perhaps natural that its hearing procedures and other methods should be wholly devoid of the fairness, consideration and impartiality which are normally followed in the relations of the Government with its citizens. Indeed, there is not even any pretense of adherence to these standards. "We can say anything we like about people and they have no recourse" (Rep. Dempsey, Cong. Rec., Jan. 23, 1940, p. 587). Its methods obliged Rep. Voorhis to resign his Committee membership in a blistering denunciation (Cong. Rec., June 24, 1942, p. 2451). Other Congressmen have from time to time shared his views with equal vigor (Cong. Rec., Feb. 9, 1939, p. 1108; Feb. 3, 1939, p. 465; Jan. 23, 1940, p. 580). Nor is it remarkable, in these circumstances, that the Committee's assumed scope and manner of operation have already incurred sharp judicial criticism as well. See *U. S.* v. *Lovett,* 328 U. S. 303-313 (1946); *Reeve* v. *Howe,* E. C. Pa. (1940), 32 Fed. Supp. 619 (Unlawful Search and Seizure by Committee Agents); *Ex parte Frankfeld,* D. C. Dist. of Col. (1940), 32 Fed. Supp. 915 (Unlawful Commencement of Criminal Prosecution by Committee Agents); *U. S.* v. *Blumberg,* D. C. Dist. of Col. (1940), Crim. No. 65,800 (Unlawful Search and Seizure by Committee Agents); *U. S.* v. *Dolson,* D. C. Dist. of Col. (1946), Criminal No. 65801 (Unlawful Arrests by Committee Agents).

This long procession of constitutional and other abuse may not be dismissed as merely so many "excesses" or "aberrations" and thus subtracted from the Committee's total record and significance. On the contrary, they are an integral part of any real constitutional analysis of its powers because they demonstrate what such a grant of power to *any* organ of Government must become—i. e., a continuing encroachment upon political thought, speech and assembly, a forced imposition of prescribed orthodoxy upon dissidence, a vehicle for compelling conformity by all to the political views of particular officials on pain of "exposure" and all its consequences.

This Court is the only remaining breakwater against this rising tide of political intolerance and hysteria. There is now no other constitutional protection against these assaults upon civil liberty which, if unchecked, will give the sanction of law to political conformity and make the Bill of Rights a dead letter. "Under our constitutional system, Courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are * * * non-conforming victims of prejudice and public excitement". *Chambers* v. *Florida,* 309 U. S. 227, 241 (1940).

In our considered view those words express the impelling reason for this prosecution. It is a reason that puts this Court under a special responsibility to apply the Bill of Rights here with the same vigor that it would if the impositions of this Committee were being resisted by those to whom no unpopular views were ascribed. "No higher duty, no more solemn responsibility, rests upon this Court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—*of whatever race, creed or persuasion.*" *Chambers* v. *Florida, supra,* at p. 241.

One concluding word. These current threats to the integrity and effectiveness of the Bill of Rights have not gone unchallenged in conservative circles of opinion.

Twenty-two faculty members of the Yale Law School have addressed a letter to the President of the United States calling for immediate abolition of the House Committee on Un-American Activities and a drastic revision of the executive "loyalty" policy "* * * so as to bring it into conformity with both the spirit and the letter of the Constitution." Their reasons are stated in terms which epitomize our position here: "It is, we believe high time that the Executive and Legislative branches of the United States Government forswear belief in witches and, by practicing democracy, set an example to those parts of the world which we hope to have embrace its principles."

CONCLUSION

We join in the petition for certiorari and earnestly entreat this Court to vindicate the spirit and the letter of our Bill of Rights by reversing these convictions and directing a dismissal of the indictments.

Respectfully submitted,

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION C.I.O.; NATIONAL UNION OF MARINE COOKS AND STEWARDS C.I.O.; INTERNATIONAL FISHERMEN & ALLIED WORKERS OF AMERICA C.I.O.; UNITED OFFICE & PROFESSIONAL WORKERS OF AMERICA C.I.O.; AMERICAN COMMUNICATIONS ASSOCIATION C.I.O.; UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA C.I.O.; INTERNATIONAL FUR & LEATHER WORKERS UNION C.I.O.; INTERNATIONAL UNION OF MINE, MILL & SMELTER WORKERS C.I.O.; UNITED PUBLIC WORKERS OF AMERICA C.I.O.; FOOD, TOBACCO, AGRICULTURAL & ALLIED WORKERS OF AMERICA C.I.O.; UNITED FARM EQUIPMENT & METAL WORKERS OF AMERICA C.I.O.; UNITED FURNITURE WORKERS OF AMERICA C.I.O.

ARTHUR G. SILVERMAN,
11 West 42nd Street,
New York 18, N. Y.,
Attorney for Amici.